Signposts

New Directions in Southern Legal History

EDITED BY SALLY E. HADDEN
AND PATRICIA HAGLER MINTER

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Studies in the Legal History of the South

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New Directions in Southern Legal History

EDITED BY SALLY E. HADDEN AND
PATRICIA HAGLER MINTER

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For sisters

Margaret Ann Hadden, Frances Schuhsler Hadden,
Patricia Hadden Gunter, Katherine Ratliff Hadden

and

Julie Hagler Lumgair and Heidi Hagler Arnold

Treasured always

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Acknowledgments

THIS VOLUME ORIGINATED in a conversation many years ago, in the early morning hours before a long day at the Organization of American Historians annual meeting, when we came up with the idea to put together a collection of essays about the legal history of the South. Over time, the idea took shape as we talked about what the many legal historians of the South had to say on the subject. It has been a great joy to work with the essayists in this volume, who have become part of this conversation, and we hope it will continue for many more years.

We thank the contributors to *Signposts*, whose excellent scholarship and collective enthusiasm for the project have made this a most rewarding endeavor. We also thank Nancy Grayson, executive editor at the University of Georgia Press, who supported us from the beginning. She has given us excellent advice as we shepherded the project from proposal to publication, and we are very grateful for her wisdom. We also thank Timothy Huebner and Paul Finkelman, editors of the Studies in the Legal History of the South, for including our volume in their outstanding series; the late Kermit L. Hall was a friend to all southern legal historians, and his loss is keenly felt. In addition, thanks go to the anonymous readers for the University of Georgia Press, who offered sage advice that guided our efforts.

Parts of this work have been presented at the American Society for Legal History, the Organization of American Historians, the British Legal History Conference, the San Francisco State University Rights Conference, and the Association of American Law Schools annual meeting. We are grateful to the many commentators, copanelists, and audience members whose questions and insights made this a far better collection than it would otherwise have been. Finally, we thank our colleagues at Western Kentucky University and Western Michigan University for their financial support and encouragement.

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Introduction

Sally E. Hadden and Patricia Hagler Minter

NEARLY THIRTY YEARS AGO, James W. Ely Jr. and David Bodenhamer hosted a conference at the University of Southern Mississippi on southern legal history that invigorated a promising yet relatively unexplored subject. Prior to their conference, southern legal history was less visible as a field, appearing only sporadically in history journals. Scholars working in the field were few, and the "vastness of the research which remain[ed] to be done" was daunting. Ely and Bodenhamer's great shared complaint was the lack of legal history studies outside New England, which meant that "a body of literature from other regions still does not exist." Such a critical omission made it "difficult for historians to judge the appropriateness of current interpretations for different sections of the country."[1] Their conference resulted in a 1984 book, *Ambivalent Legacy*. To this day, it remains the only broad work to collect research by southern legal historians working on an array of topics beyond race and slavery, for their volume also examined law and the regional economy as well as the southern bench and bar. Following that conference, scholars moved outward, investigating subjects ranging widely across the South's legal history, and their work attracted new interest in the field, which has grown steadily ever since. As part of the generation of legal historians inspired by this pioneering work, we believe that it is time to bring forward a collection of the newest research in southern law and history that demonstrates its dynamism and diversity. *Signposts: New Directions in Southern Legal History* is intended as a long-delayed successor to *Ambivalent Legacy* that hopes to inspire a new generation of scholarship in the field while highlighting the exceptional work scholars are currently doing all over the South.

Our approach differs from our predecessors' in ways that reflect the

changes and growth in southern legal history over the past thirty years. In 1984, the lines between legal history and constitutional history were clearly drawn; while *Ambivalent Legacy* focused on the legal history of the South, the region's constitutional history did not appear in that volume. Instead, that subject was explored in another edited volume of conference essays, Kermit L. Hall's *An Uncertain Tradition* (1989). Here, however, we present essays that consider legal and constitutional history together, revealing how the two approaches have converged over the past three decades. The work showcased in this volume demonstrates clearly that the old boundaries have become blurred and that much of the newest scholarship combines legal with constitutional history, private with public law.[2] Even the names of the earlier volumes, *Ambivalent Legacy* and *Uncertain Tradition*, suggested that their place in the national story of legal history was ambiguous at best. The authors of essays in the *Signposts* volume have no such qualms about the role of southern legal history or their contributions to it, which move outward from the pioneering work completed by Ely, Bodenhamer, and Hall.

Ambivalent Legacy had its limitations. In avoiding New England's gravitational pull, several of the volume's essays found a new southern touchstone: Virginia. Southern state debt, slave codes, and criminal justice all had their moment in the sun—but only a Commonwealth sun. If not exploring the Old Dominion, essayists in the collection tended to examine legal questions from a pan-southern point of view, pulling back for a macrolevel look at topics such as the legal strategy pursued by the National Association for the Advancement of Colored People, judicial elections, or the antebellum economy. While both approaches have merit, they tended to give *Ambivalent Legacy* a somewhat kaleidoscopic effect: its chapters were largely about the Upper South (especially Virginia) or the entirety of the South. Of course, the editors of *Ambivalent Legacy* worked with the tools available at the time; they could not demand that the few southern legal historians of that era examine every period or every part of the South with equal vigor. For example, in the 1980s, slavery dominated scholarship, both inside and outside the field of legal history, so chapters on slave law naturally predominated in the volume. The initial foray made by *Ambivalent Legacy*, however, pushed scholars to branch out and examine legal topics in a much broader range of locations and on topics far afield from slavery. As a result, *Signposts* has but a handful of essays about slavery and only one chapter exclusively on Virginia. We sought out essays that give this volume topical diversity, with enhanced coverage of the Deep South. We have organized the essays

into three sections delineating major temporal themes in southern legal history: Colonial and Early National Legal Regimes; Law and Society in the Long Nineteenth Century; and Constitutionalism, Civil Rights, and Civil Liberties. The more varied essay topics and broader geographic coverage in *Signposts*, however, raise the question of what constitutes the South's legal boundaries and where the boundaries of the South are to be found, both mentally and geographically.

To study a region is immediately to enter an intellectual maze that appears to permit no exit. The mere act of defining a region requires a mandatory contrast against some other construct (be it another region or nation), suggestive of difference. Yet to express or find what holds that region together is to deny any suggestion of internal dissent or possible loss of cohesion. This foundational problem is present in all studies of regions and has been well described by historian Michael Zuckerman: the "region is at once a de-centering idea and an integrating one. Relative to the nation, it affirms a persisting diversity. In itself, it inevitably denies such diversity."[3]

Southern legal historians continue—like all southern historians—to grapple with the difficulty of defining their subject area as well as determining its relationship to national and international scholarship. Noted historians such as Edward L. Ayers, Peter Kolchin, and Laura F. Edwards have stepped forward to offer their assessments of what makes southern history and the South distinctive and vital for generation after generation of scholars.[4] Their suggestions have helped to shape current interpretations of southernness, emphasizing that the region is both more and less distinct historically than previous historians may have thought while suggesting that we have plenty left to learn about the South. Ayers points out that we rarely contextualize the South beyond the nation-state; for most Americans, the region serves simply as a stand-in for exoticness, a miniature Latin America within the United States, bursting with climatic differentness.[5] Some legal historians implicitly follow this line of reasoning, offering only the barest of mentions of the South's legal developments. Kolchin picks up on Ayers's comparative theme, noting that few scholars have made internal comparisons between the "many Souths" that simultaneously coexisted and that students of the region have rarely tracked changes in the South over time.[6] And Edwards boldly asserts that "southern distinctiveness exists more as a cultural and historiographical construct than as a useful description of southern history."[7] All three authors strongly support the idea that southern identity and southernness (as a counterpoint to national identity) have been overempha-

sized, largely in the wake of the Civil War and Reconstruction, while less account has been taken of the ways in which southerners—red, black, and white—experienced many of the same economic, racial, and political problems encountered by Americans living elsewhere. The idea that the South perhaps better exemplified national trends than the North, at least in the antebellum era, has at last taken root.[8] Embracing a less-than-exceptionalist view of the South, Ayers, Kolchin, and Edwards still acknowledge that there *is* nonetheless something different about the South that makes it appear distinctive both to those who live in the region and to those who reside outside it. Southern historians have wrestled for decades with this paradox when attempting to locate the nexus of a regional identity for a widely diverse population: the South is, and the South is not.

For the southern legal historian, this legacy of southern not-quite-exceptionalism is compounded by definitional problems that refuse to go away. Where are the region's boundaries? What gives it cohesion? When discussing the South, does one mean only the Confederate South, only the slave-owning South, or perhaps only the predominantly English-speaking common law South? The authors in *Signposts* have chosen to answer these questions in different ways, but many of the replies appear to be in the negative. For colonial essayists Susan Richbourg Parker, Jennifer M. Spear, Thomas N. Ingersoll, and Sally E. Hadden, the South was hardly coterminous with the future Confederacy. The Spanish, French, and British empires created legal regimes that operated in the South for decades—in each case, for much longer than the Confederacy. Laws in three European languages crafted the labor regime that came to dominate the South for many of the years before 1861, and the earliest measures were tied to the civil law, not common law. These authors' contributions build on work by scholars over the past thirty years who have considered non–common law systems and borderlands that encompassed northern New Spain, colonial French and Spanish Louisiana, and the regions where different legal regimes came into contact.[9] Much remains to be done in these regions, particularly in realms beyond slave law and property.

Regardless of the dominant legal regime, slavery and the problem of race unite much of the scholarship written on the antebellum South, as the powerful *Signposts* essays crafted by Alfred L. Brophy and Christopher R. Waldrep attest.[10] Their chapters rely, as others do, on the massive outpouring of scholarship on slavery and the law of the past thirty years, covering topics

such as voluntary reenslavement and manumission, marriage and divorce, inheritance, disinheritance, disability, and crime.[11]

Yet slavery cannot adequately define the boundaries of southern legal history, for even when studying eras when slavery operated, southern legal historians have addressed subjects that escape the powerful gravity of that subject. *Signposts* contributors Laura F. Edwards, Jessica K. Lowe, and James W. Ely Jr. offer testimony that supports the idea that excellent legal history can be written on the pre– and post–Civil War South without fixating on slavery to the exclusion of all else. Indeed, Ely's essay argues persuasively that our preoccupation with race and slavery has come at the expense of more powerful analytical explanations, such as debt and the economy.[12] Similarly, the creation of the Confederacy embodied the white South's commitment to the institution of slavery, yet even Confederate legal minds were capable of crafting legal arguments about other subjects, as Roman J. Hoyos's essay makes abundantly clear. Slavery, then, may have been definitional in the legal mind of the Old South, but it was not all-powerful.

If not the Confederacy or slavery or the common law, then to what other factors might one turn in search of a unifying thread through southern legal history? Race and power are two intensely strong subjects that appear to bind together many of the *Signposts* contributors. Indeed, the combination of race and power can be found in most of the essays in this volume. Lynching, incarceration, education, voting, and civil rights all implicate the legal and illegal uses of power in American—and southern—society. *Signposts* essayists are hardly alone in this approach: the past three decades have seen a vast literary output on murder, lynching, and incarceration.[13] Yet to highlight power is perhaps to state the obvious: law is about power, its exercise or absence, through means legal, extralegal, and illegal, at whatever level of society. Every essay in this collection either directly or indirectly explores the domain of law's power. The interaction of race and power continues to play a vital role for many southern legal historians, even if the spotlight has moved slightly away from the institution of slavery itself.

This collection of essays clearly shows that slavery no longer dominates the landscape of southern legal history as forcefully as it once did. While slavery continues to draw the gaze of legal historians into a world of obvious inhumanity that repels yet fascinates us, other topics now have scholars' full attention, with slavery subordinated or even absent. In part, this new viewpoint reflects a reorientation of broader historical scholarship away

from slavery's brutality as the rise of slave agency theory has tended to obscure the harshness of legalized exploitation. But the change also constitutes a recognition that others operated outside the circles of privilege, and we want to know how they defined their own power (or lost it in the process of the law's negotiations). Accordingly, historians since the 1960s have evinced a growing and accelerating interest in subordinated subjects. Other marginalized groups, including women and native peoples, now attract the scholar's eye, as essays by Susan Richbourg Parker, Laura F. Edwards, and Tim Alan Garrison show. Powerful historical currents have brought together women's history and southern legal history, a trend visible in the literature of the past thirty years.[14] Native Americans, whose legal history is less fully explored, have made substantial gains in the past few decades, but much remains to be learned.[15] The diversity within the South that has drawn many legal scholars' attention is only now being matched by a comparative perspective that contrasts the South with the world around it. A greater attention to the Atlantic, Caribbean, and international connections of southern law infuses the work of several *Signposts* essayists, reflecting the attraction of that broader canvas for many in the historical profession since the early 1990s.

Other changes in the historical discipline have made their effects felt within southern legal history. The dramatic impact of computing power has led to a resurgence of cliometrics and the increased use of computerized data gathering as well as data presentation. The computerized management of massive data—notes on five thousand case files, compiled by Lisa Lindquist Dorr, for example—makes possible the recovery of minute, incredibly detailed information about a host of previously unknown individuals. The computer manipulation of such information is perhaps most obvious in the essay by Jennifer M. Spear, whose presentation of slave manumission data reveals the visual power that computers can wield even as they make latent historical information more accessible.

As southern legal history has moved forward to embrace these new tools and newer modes of analysis, its scholars offer us fresh reconsiderations of material we once thought clear and uncomplicated. Alfred L. Brophy asks that future scholars recast the relationship between legal history and intellectual history in the South. Rather than relegate legal thinkers to the virtual dustbin, he indicates their importance to understanding the manifold contributions made by southern legal intellectuals without restricting the analysis to one fixated solely on slavery. Southern lawyers, judges, and juries

have enjoyed a surge in scholarly interest, but few historians have integrated these figures into the national—much less regional—intellectual milieu.[16] Exploring the sometimes conflicted motivations of bench and bar is a leitmotif of *Signposts* authors stretching from topics such as eighteenth-century jurists (Jessica K. Lowe) and nineteenth-century lawyers (Tim Alan Garrison, Roman J. Hoyos, Cynthia Nicoletti) to the civil rights advocates and reapportionment challengers of the twentieth century (Patricia Hagler Minter, Christopher W. Schmidt, Charles L. Zelden).

The field of civil rights, dominated by the long shadow of pre– and post–*Brown v. Board of Education* scholars, has some key innovators among the *Signposts* essayists. Taken together, their work rethinks previous debates and crafts new insights on race and law, a debate that has frequently centered on the much-studied march to and from that seminal decision. Cynthia J. Nicoletti offers a fresh investigation of "cause lawyering" conducted by northern and southern attorneys who sought to dismantle Reconstruction through concerted attacks that ultimately brought an end to the South's military occupation. And Peter Wallenstein disrupts existing assumptions about the primacy of *Brown* by investigating the legal restructuring of collegiate public education in the years after *Plessy v. Ferguson*. Similarly, three contributors take new looks at twentieth-century civil and political rights by not only using new sources to study high court decisions and federal law but also reinterpreting ground well trod by previous generations of scholars. Of course, these authors build on a vast and constantly growing literature on civil rights.[17] Essays in this volume by Patricia Hagler Minter and Christopher W. Schmidt take seriously the questions raised by libertarian legal thinkers and scholars about race and property rights on the road from early twentieth-century test cases to the revolutionary Civil Rights Act of 1964. Both scholars ultimately reject the libertarian claim that the elevation of individual property rights was the real essence of civil rights in America. Charles L. Zelden's careful study of race and reapportionment in the South reveals the multivariant strands woven in a web of race-based voter suppression, a struggle that continues as the editors finish this volume. Taken together, Minter's, Schmidt's, and Zelden's essays paint a vivid picture about the legal triumphs over Jim Crow in earlier high court decisions and in federal law, but their collective work also provides a cautionary tale about the burdens of the past that remain with us both in rhetoric and in action. Their work also highlights the merging of legal and constitutional history in the new generation of southern legal history.

Many of the *Signposts* essays tacitly acknowledge the influential work produced by pioneering law and society scholar J. Willard Hurst, whose research insisted that high court decisions were but one level of legal-historical action to be investigated.[18] Dorr makes this connection manifest in her examination of municipal arrest records and gubernatorial petitions of women during the Prohibition era, as does Hadden in her chapter exploring the volume and contents of South Carolina grand jury presentments published in colonial newspapers. Public awareness of law, lawbreaking, and lawful behavior can be found in many of the essays, even as evolving notions of lawful behavior are called into question. The changing qualities of legal doctrine over decades are highlighted in the chapters by Ely and Wallenstein, each of whom takes the century as his period of study. Similarly, Waldrep's consideration of how lynching and democracy inform each other adopts the broadest possible geographic canvas even as it burrows into the workings of a Mississippi lynching from the 1830s. Local and state legal history receive a full airing in *Signposts*, while the recent trend toward microhistorical studies makes its presence felt in essays by Ingersoll and Edwards. We believe Hurst would approve.

Nonetheless, a number of topics remain tantalizingly out of reach for this volume, and southern legal history still contains numerous uncharted spaces and places where only the barest outlines have been sketched in by early explorers. The reception of English law in the colonial era, the analysis of colonial charters, the development of early legal systems, and codification—all well explored subjects elsewhere in America—have barely been examined in the South.[19] The same can be said for married women's property acts, religion and law, Native American legal practices (beyond scholarship about the Cherokee Nation), and studies contrasting indentured servants with slaves.[20] While some primary sources have been published, more editions are needed to make the raw material of the law readily available.[21] Finally, southern experiences need more frequently to be placed into comparative context. We hope this collection will inspire historians to begin this important work.[22]

Not just southern legal history but all legal history in the twenty-first century appears more inclined to cross disciplinary boundaries to develop accurate and creative analyses of the past. Essays in *Signposts* fuse legal history with the history of migration, the history of violence, the history of information, and the history of clothing, to name but a few chapter pairings. This interdisciplinary approach demonstrates the vitality of the field as well as the cutting-edge qualities of the essays in this volume. From the class-

room to the courtroom, from bad roads to bad women, the scholars in *Signposts* prove that southern legal history is alive and well, with scholarship on an amazing array of subjects. The essays in this collection show that understanding how law changes over time is essential to understanding southern history. As editors, we hope not only that *Signposts* is a worthy successor to the volume that inspired its creation but also that *Signposts* will provide a new window through which we may see far more clearly "what we talk about when we talk about the South."[23]

NOTES

1. David J. Bodenhamer and James W. Ely Jr., preface to *Ambivalent Legacy: A Legal History of the South*, ed. David J. Bodenhamer and James W. Ely Jr. (Jackson: University Press of Mississippi, 1984), vii–viii.

2. See Kermit L. Hall and James W. Ely Jr., eds., *An Uncertain Tradition: Constitutionalism and the History of the South* (Athens: University of Georgia Press, 1989).

3. Michael Zuckerman, "Regionalism," in *A Companion to Colonial America*, ed. Daniel Vickers (Malden, Mass.: Wiley-Blackwell, 2003), 317.

4. Edward L. Ayers, "What We Talk about When We Talk about the South," in *All over the Map: Rethinking American Region*, ed. Edward L. Ayers, Patricia Nelson Limerick, Stephen Nissenbaum, and Peter S. Onuf (Baltimore: Johns Hopkins University Press, 1995), 62–82; Peter Kolchin, *A Sphinx on the American Land: The Nineteenth-Century South in Comparative Perspective* (Baton Rouge: Louisiana State University Press, 2003); Peter Kolchin, "The South and the World," *Journal of Southern History* 75, no. 3 (2009): 565–80; Laura F. Edwards, "Southern History as U.S. History," *Journal of Southern History* 75, no. 3 (2009): 533–64.

5. Ayers, "What We Talk About," 73.

6. Kolchin, *Sphinx*, 4–5.

7. Edwards, "Southern History as U.S. History," 533.

8. Potter championed this interpretation in the 1960s and 1970s. See David Potter, "The Historian's Use of Nationalism and Vice Versa," in *The South and the Sectional Conflict* (Baton Rouge: Louisiana State University Press, 1976), 68–78; David Potter, *The Impending Crisis, 1858–1861* (New York: Harper and Row, 1976), 8–14, 29–34, 449–50, 469–74.

9. On northern New Spain and Mexico, see Charles R. Cutter, *The Legal Culture of Northern New Spain, 1700–1810* (Albuquerque: University of New Mexico Press, 1995); M. C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (Austin: University of Texas Press, 2004); James F. Brooks, *Captives and Cousins: Slavery, Kinship, and Community in the Southwest Borderlands* (Chapel Hill: University of North Carolina Press, 2002); Kristopher B. Paschal, "'Texas Must Be a Slave Country': The Development of Slavery in Mexican Texas and the Institution's Role in the Coming of Revolution, 1821–1836" (PhD diss., Southern Methodist University, 2010). On French Louisiana, see Warren M. Billings and Mark F. Fernandez, eds., *A Law unto Itself? Essays in the New Louisiana Legal History* (Baton Rouge: Louisiana State University Press, 2001); Thomas N. Ingersoll, *Mammon and Manon in Early New Orleans: The First Slave Society in the Deep South, 1718–1819* (Knoxville: University of Tennessee Press,

1999); Jennifer M. Spear, *Race, Sex, and Social Order in Early New Orleans* (Baltimore: Johns Hopkins University Press, 2009); Mark Fernandez, *From Chaos to Continuity: The Evolution of Louisiana's Judicial System, 1712–1862* (Baton Rouge: Louisiana State University Press, 2001). On the meeting of diverse legal systems, see Bradley J. Nicholson, "Legal Borrowing and the Origins of Slave Law in the British Colonies," *American Journal of Legal History* 38, no. 1 (1994): 38–54; Stuart Banner, "Written Law and Unwritten Norms in Colonial St. Louis," *Law and History Review* 14, no. 1 (1996): 33–80; Stuart Banner, *Legal Systems in Conflict: Property and Sovereignty in Missouri, 1750–1860* (Norman: University of Oklahoma Press, 2000).

10. Christopher R. Waldrep alone is responsible for numerous works on race, slavery, and the law. In addition to *Roots of Disorder: Race and Criminal Justice in the American South 1817–80* (Urbana: University of Illinois Press, 1998), a select listing of Waldrep's work includes "Planters and the Planters' Protective Association in Kentucky and Tennessee," *Journal of Southern History* 52, no. 4 (1986): 565–88; "The Impact of Race on Law in Kentucky: A Research Note," *Register of the Kentucky Historical Society* 90 (1992): 165–82; *Night Riders: Defending Community in the Black Patch, 1890–1915* (Durham: Duke University Press, 1993); "Substituting Law for the Lash: Emancipation and Legal Formalism in a Mississippi County Court," *Journal of American History* 82, no. 4 (March 1996): 1425–51; "War of Words: The Controversy over the Definition of Lynching, 1899–1940," *Journal of Southern History* 66, no. 1 (February 2000): 75–100; Donald Nieman and Christopher R. Waldrep, eds., *Local Matters: Race and Law and Justice in the Nineteenth-Century South* (Athens: University of Georgia Press, 2001); *The Many Faces of Judge Lynch: Extralegal Violence and Punishment in America* (New York: Palgrave, 2002).

11. A partial list of important works on law and slavery or race written since 1984 includes Austin Allen, *Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837–1857* (Athens: University of Georgia Press, 2006); Jennifer Barclay, "Cripples All! or, The Mark of Slavery: Disability and Race in Antebellum America, 1820–1860" (PhD diss., Michigan State University, 2011); Emily Blanck, "Revolutionizing Slavery: The Legal Culture of Slavery in Revolutionary Massachusetts and South Carolina" (PhD diss., Emory University, 2003); David S. Bogen, "The Maryland Context of Dred Scott: The Decline in the Legal Status of Maryland Free Blacks, 1776–1810," *American Journal of Legal History* 34, no. 4 (1990): 381–411; James M. Campbell, *Slavery on Trial: Race, Class, and Criminal Justice in Antebellum Richmond, Virginia* (Gainesville: University Press of Florida, 2007); Andrew Fede, "Legitimized Violent Slave Abuse in the American South, 1617–1865: A Case Study of Law and Social Change in Six Southern States," *American Journal of Legal History* 29, no. 2 (1985): 93–150; Paul Finkelman, ed., *Slavery and the Law* (Madison, Wis.: Madison House, 1997); Ariela Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton: Princeton University Press, 2000); Laura F. Edwards, "'The Marriage Covenant Is at the Foundation of All Our Rights': The Politics of Slavery Marriages in North Carolina after Emancipation," *Law and History Review* 14, no. 1 (1996): 81–124; Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Cambridge: Harvard University Press, 2001); Daniel Hamilton, *The Limits of Sovereignty: Property Confiscation in the Union and the Confederacy during the Civil War* (Chicago: University of Chicago Press, 2007); Bernie Jones, *Fathers of Conscience: Mixed-Race Inheritance in the Antebellum South* (Athens: University of Georgia Press, 2009); Walter Johnson, "Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery," *Law and Social Inquiry* 22, no. 2 (1997): 405–34; Kelly Kennington, "River of Injustice: St. Louis's

Freedom Suits and the Changing Nature of Legal Slavery in Antebellum America" (PhD diss., Duke University, 2009); Edward Maris-Wolf, "Liberty, Bondage, and the Pursuit of Happiness: The Free Black Expulsion Law and Self-Enslavement in Virginia, 1806–1864" (PhD diss., College of William and Mary, 2011); Glenn McNair, *Criminal Injustice: Slaves and Free Blacks in Georgia's Criminal Justice System* (Charlottesville: University of Virginia Press, 2009); Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill: University of North Carolina Press, 1996); Donald Nieman, *Promises to Keep: African Americans and the Constitutional Order, 1776 to the Present* (New York: Oxford University Press, 1991); Anthony Parent, *Foul Means: The Formation of a Slave Society in Virginia, 1660–1740* (Chapel Hill: University of North Carolina Press, 2003); Thomas Russell, "Sale Day in Antebellum South Carolina: Slavery, Law, Economy, and Court-Supervised Sales" (PhD diss., Stanford University, 1993); Judith Schaefer, *Slavery, Civil Law, and the Supreme Court of Louisiana* (Baton Rouge: Louisiana State University Press, 1997); Philip Schwarz, *Twice Condemned: Slaves and the Criminal Laws of Virginia, 1706–1865* (Baton Rouge: Louisiana State University Press, 1988); Philip Schwarz, *Slave Laws in Virginia* (Athens: University of Georgia Press, 1996); Michael P. Johnson, "Denmark Vesey and His Co-Conspirators," *William and Mary Quarterly*, 3rd ser., 58, no. 4 (2001): 915–76 (to be read in conjunction with James Spady, "Power and Confession: On the Credibility of the Earliest Reports of the Denmark Vesey Slave Conspiracy," *William and Mary Quarterly*, 3rd. ser., 68, no. 2 [2011]: 287–304); Waldrep, *Roots of Disorder*.

12. Surprisingly few scholars have taken up the challenge issued by Bodenhamer and Ely's *Ambivalent Legacy* to reevaluate the South's economy from a legal perspective, aside from considering sharecropping and postbellum bankruptcy. See Miller Karnes, "Law, Labor, and Land in the Postbellum Cotton South: The Peonage Cases in Oglethorpe County, Georgia, 1865–1940" (PhD diss., University of Illinois, Urbana-Champaign, 2000); Melissa Milewski, "From Slave to Litigant: African Americans in Court in the Post-War South, 1865–1920" (PhD diss., New York University, 2011); Dylan Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* (Chapel Hill: University of North Carolina, 2003); Loren Schweninger, *Black Property Owners in the South, 1790–1915* (Urbana: University of Illinois, 1990); Elizabeth Lee Thompson, *The Reconstruction of Southern Debtors: Bankruptcy after the Civil War* (Athens: University of Georgia Press, 2004); Harold Woodman, *New South, New Law: The Legal Foundations of Credit and Labor Relations in the Postbellum Agricultural South* (Baton Rouge: Louisiana State University Press, 1995).

13. See, e.g., Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the Nineteenth Century American South* (New York: Oxford University Press, 1984); Stephen Berrey, "Against the Law: Violence, Crime, State Repression, and Black Resistance in Jim Crow Mississippi" (PhD diss., University of Texas at Austin, 2006); Mary Ellen Curtin, *Black Prisoners and Their World: Alabama, 1865–1900* (Charlottesville: University of Virginia Press, 2000); Rosemunde Goode, "Dying to Vote: The Negroes' Struggle to Secure the Right to Vote in Upcountry South Carolina, 1868–1898" (PhD diss., Morgan State University, 2008); Elliott Gorn, "'Gouge and Bite, Pull Hair and Scratch': The Social Significance of Fighting in the Southern Backcountry," *American Historical Review* 90, no. 1 (1985): 18–43; LeeAnna Keith, *The Colfax Massacre: The Untold Story of Black Power, White Terror, and the Death of Reconstruction* (New York: Oxford University Press, 2008); Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (New York: Holt, 2008); Suzanne Lebsock, *A Murder in Virginia: Southern Justice on Trial* (New York: Norton, 2003); Paul

Lucko, "Prison Farms, Walls, and Society: Punishment and Politics in Texas, 1848–1910" (PhD diss., University of Texas at Austin, 1999); Kenneth W. Mack, "Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905," *Law and Social Inquiry* 24, no. 4 (1999): 377–410; Matthew Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866–1928* (Columbia: University of South Carolina Press, 1996); Patricia Hagler Minter, "The Codification of Jim Crow: The Origins of Segregated Railroad Transit in the South, 1865–1910" (PhD diss., University of Virginia, 1994); Patricia Hagler Minter, "The Failure of Freedom: Class, Gender, and the Evolution of Segregated Transit Law in the Nineteenth-Century South," *Chicago-Kent Law Review* 70, no. 3 (1995): 993–1012; Julie Novkov, "Racial Constructions: The Legal Regulation of Miscegenation in Alabama, 1890–1934," *Law and History Review* 20, no. 2 (2002): 225–77; Gail O'Brien, *The Color of the Law: Race, Violence, and Justice in the Post–World War II South* (Chapel Hill: University of North Carolina Press, 1999); David Oshinsky, *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press, 1996); John Ratliff, "'In Hot Blood': White-on-White Lynching and the Privileges of Race in the American South, 1889–1910" (PhD diss., University of Alabama, 2007); Donna Spindel, *Crime and Society in North Carolina, 1663–1776* (Baton Rouge: Louisiana State University Press, 1989); Peter Wallenstein, *Blue Laws and Black Codes: Conflict, Courts, and Change in Twentieth-Century Virginia* (Charlottesville: University of Virginia Press, 2004); Lou Falkner Williams, *The Great South Carolina Ku Klux Klan Trials, 1871–1872* (Athens: University of Georgia Press, 1996). See also the works of Waldrep cited in n. 10.

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Judges," *Law and History Review* 4, no. 1 (1986): 129–59; Polly Price, *Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench* (Amherst, N.Y.: Prometheus, 2009); David Pye, "Legal Subversives: African American Lawyers in the Jim Crow South" (PhD diss., University of California, San Diego, 2010); James D. Rice, "The Criminal Trial before and after the Lawyers," *American Journal of Legal History* 40, no. 4 (1996): 455–75; Stewart Rosenblum, "Pursuing Order in the Wake of War: Southern State Supreme Courts, 1860–1880" (PhD diss., Yale University, 2010); Kristoffer Shepard, "Poverty Lawyers and Poor People in the Deep South, 1965–1996" (PhD diss., Emory University, 2001); William G. Thomas, *Lawyering for the Railroad: Business, Law, and Power in the New South* (Baton Rouge: Louisiana State University Press, 1999); John Waldrup, "James Iredell and the Practice of Law in Revolutionary Era North Carolina" (PhD diss., University of North Carolina, 1985).

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18. See generally J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1964).

19. For examples that suggest what might be accomplished, see Harold Tate, "South Carolina's Reception of English Law" (PhD diss., University of South Carolina, 2008); Albert J. Martinez, "The Palatinate Clause of the Maryland Charter, 1632–1776: From Independent Jurisdiction to Independence," *American Journal of Legal History* 50, no. 3 (2008–10): 305–25; John E. Douglass, "The Creation of South Carolina's Legal System, 1670–1731" (PhD diss., University of Missouri, 1984); Erwin C. Surrency, "The Georgia Code of 1863 and Its Place in the Codification Movement," *Journal of Southern Legal History* 11, nos. 1–2 (2003): 13–80.

20. Some excellent initial forays have been made by Megan Benson, "Fisher v. Allen: The Southern Origins of the Married Women's Property Acts," *Journal of Southern Legal*

History 6, nos. 1–2 (1998): 97–122; Nicholas May, "Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia," *American Journal of Legal History* 49, no. 3 (2007): 237–56; Christine Daniels, "'Liberty to Complaine': Servant Petitions in Maryland, 1652–1797," in *Many Legalities of Early America*, ed. Christopher Tomlins and Bruce Mann (Chapel Hill: University of North Carolina Press, 2001), 219–49. Holly Brewer's innovative suggestions about the power of entail have yet to be considered in southern contexts outside of Virginia. See Holly Brewer, "Entailing Aristocracy in Colonial Virginia," *William and Mary Quarterly*, 3rd ser., 54, no. 2 (1997): 307–46; Holly Brewer, "Power and Authority in the Colonial South," in *Britain and the American South: From Colonialism to Rock and Roll*, ed. Joseph Ward (Jackson: University Press of Mississippi, 2003), 27–51.

Federal entitlement programs that affected the South have received uneven attention from scholars, who have sometimes preferred to work on other regions. For an example of what could be accomplished, see Brandi Brimmer, "All Her Rights and Privileges: African-American Women and the Politics of Civil War Widows' Pensions" (PhD diss., University of California, Los Angeles, 2006). Similarly, the impact of various constitutional amendments, such as the Eighteenth (establishing Prohibition), on southern daily life and legal practice requires more intense investigation. See, e.g., Richard Hamm, "Southerners and the Shaping of the Eighteenth Amendment, 1914–1917," *Journal of Southern Legal History* 1, no. 1 (1991): 81–108.

21. Charles H. Lesser, *South Carolina Begins: Records of a Proprietary Colony, 1663–1721* (Columbia: South Carolina Department of Archives and History, 1995); Susan Baldwin Bates and Harriott Cheves Leland, eds., *Proprietary Records of South Carolina*, vols. 1–3 (Charleston: History Press, 2005–7); Loren Schweninger, ed., *The Southern Debate over Slavery*, vol. 1, *Petitions to Southern Legislatures, 1778–1864* (Urbana: University of Illinois Press, 2001); Loren Schweninger, ed., *The Southern Debate over Slavery*, vol. 2, *Petitions to Southern County Courts, 1775–1867* (Urbana: University of Illinois Press, 2008); and the multivolume *Freedom: A Documentary History of Emancipation, 1861–1867* (Cambridge: Cambridge University Press, 1985–). The journal literature on southern legal history can be found in many venues, but particularly in the *American Journal of Legal History*, *Law and History Review*, and *Journal of Southern Legal History* (published in 1991–92 as the *Georgia Journal of Southern Legal History*).

22. Pfeifer's study of lynching in Iowa, Wyoming, and Louisiana suggests one model for doing this work. See Michael J. Pfeifer, *Rough Justice: Lynching and American Society, 1874–1947* (Urbana: University of Illinois Press, 2004).

23. Thanks to Edward Ayers for this excellent phrasing. See Ayers, "What We Talk About."

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In My Mother's House

Dowry Property and Female Inheritance Patterns in Spanish Florida

Susan Richbourg Parker

PROVERBIAL SPANISH WISDOM admonishes betrothed couples in rhythm and rhyme, *Antes de casar, ten casa de morar* (Before marrying, have a house to live in). The residents of Spanish Florida developed ways to address this universal concern through combining the laws of the Spanish empire with local realities in the colonial period. In St. Augustine, brides, not grooms, often were the source of the homes for the new family. In part, the reliance on females for homes was a pragmatic response to the number of landless men. In the last quarter of the seventeenth century, men began arriving in Florida from Iberia and from Spain's colonies to serve as soldiers. While the new military arrivals could offer a prospective wife a soldier's pay and perhaps money to acquire movable goods, they could not bring land for a home.

The founding settlers' "utopia of mutual hopes" for La Florida, where commoners would embrace land and profit and nobles would develop agricultural enterprises and acquire vassals, did not come to be. When Pedro Menéndez de Avilés landed at the place he would name St. Augustine in September 1565, he was guided and bound by a contract with King Philip II of Spain, signed on March 15, that apportioned among the king, Menéndez, and his investors the gold and silver, precious stones, pearls, and profits from mines that were to be had in La Florida, an area that included much of North America. The supporting cast of soldier-settlers and craftsmen expected to gain their riches from the acquisition of a parcel of land. No profit would accrue to the black slaves, of course.[1]

La Florida did not become a producing region for either Spain's economic benefit or for the colony's investors, but its proximity to the Gulf Stream offered an asset that Spain could not risk losing to the control of an-

other nation. Near St. Augustine, the Gulf Stream turned sharply eastward, and the natural propulsion of the current carried Spanish galleons away from the Americas and out into the Atlantic Ocean toward Europe. This route made St. Augustine the last chance for Spain's fleets to get assistance with navigational problems or aid when enemy vessels threatened.[2] When 1602 hearings questioned Florida's benefit to the empire in light of its meager production, justification for maintaining the colony was put forth in the larger context of the colony's role in providing security to the fleets and therefore to Spain's economy.[3]

Spain needed Florida as a military outpost to protect the sea lanes.[4] Spain's forays into Mexico and Peru yielded developments that made the Gulf Stream truly a river of silver. Large-scale silver mining provided cargo for the annual fleet of ships that passed by the Florida peninsula on the fast ocean current to Europe. Silver production, which far surpassed that of gold, reached its greatest heights between 1550 and 1570, and St. Augustine was established during the latter years of that period. The continued existence of Florida as a Spanish colony became an expense to the Crown starting in 1570 with a decree that a regular annual royal subsidy would be paid from one of the king's American treasuries; the first payment was made in 1571. The Spanish Crown could not renounce the costs of Florida without risking the loss of the colony and its protection of the fleets from the Indies. Yet in 1763, Spain would lose Florida as part of the larger imperial chess game of war and territory.[5]

Thus the Euro-American residents of La Florida would receive most of their support from the military payroll or *situado* (subsidy). Although Florida had some farms and cattle ranches, the majority of Euro-American property owners held real estate as family home sites within the walls of St. Augustine, the colony's capital city, or nearby areas. Home sites in St. Augustine were not "units of production," as they were elsewhere in North America, but residences with gardens and some food animals. Families did not rely on their home sites to sustain them or provide purchasing power; instead, the home sites augmented the military salaries and supplies provided by the Spanish Crown to support the soldiers. The focus of real property practices was to ensure living space for families, especially in a town where husbands were often nonlocal and thus nonlanded men.

St. Augustine's residents adapted the Iberian tradition of the dowry to provide new families with their own homes. Although houses were not the usual dowry, a home site was an asset that a St. Augustine family could

offer to hasten a daughter's marriage to a recently arrived but landless soldier or to make a more beneficial match. If widowed, a woman regained control of her dowry; she did not have to depend on her husband's legatees and their possible largesse toward her. The dowry house provided her with security and with authority over the property; if she were widowed or her children were orphaned, a family home would still provide shelter. The house might also serve as a magnet, attracting another husband to the widowed woman.

Where land was perceived as a lesser source of wealth, women achieved a more nearly equal claim to land. Historian John Crowley underscores this pattern by asserting that British American tradesmen and merchants were more generous to their widows than were planters. By contrast, in agricultural areas in North America, especially in the British colonies, the concern was usually for maintaining the viability of the productive unit—the farm. Planters often evidenced this perspective by establishing inheritance arrangements favoring the farm's longevity over a surviving spouse's needs.[6]

In Spanish Florida, the dominant role of a source of revenue other than land—the military budget—engendered a pattern of residential property ownership through successive female generations. Very few property records remain from Florida's first two centuries (1565–1763). Those that are available indicate that mothers often passed on home sites to their daughters. In a military town, male roles and values would have dominated society even more than in other kinds of settlements, yet an intensive investigation of documentation pertaining to individual sites illustrates the important role of women in creating St. Augustine's social and economic stability. St. Augustine's white female population was almost exclusively Creole (born in the Americas), descending from the earliest settlers. In St. Augustine's earliest years with its sex imbalance among the Europeans, soldiers from Iberia found wives among the Christianized Native American women. Nevertheless, the Euro-American population came to define itself as Spanish, not mestizo, and over the generations, the Native American ancestry may have become unknown. In the late seventeenth century and the first half of the eighteenth century, many of these women found husbands among the garrison's soldiers, most of whom came from Spain, with some from Cuba or Mexico. St. Augustine's society responded to the immigrant husbands' limited access to real property by providing homes for the families formed by the marriage of a local woman and a newly arrived man. The Laws of the Indies, which applied to all of Spain's New World colonies, provided a

ready legal mechanism in the dowry to accommodate Florida's specific demographic situation.

Two parcels of land located across the street from each other in St. Augustine exemplify this type of property transfer. Gerónima Rodríguez lived and died in a house on the west side of the Street of the Governor (today's St. George Street) in the first third of the eighteenth century.[7] Three generations of daughters would live on the same lot at the end of the alley leading to the fort (figure 1). Gerónima's mother, Gertrudis de Morales, married three times. Her first husband was a native of Havana, while her second was born in St. Augustine. Gerónima's father was Gertrudis's third husband, José Antonio Rodríguez, a native of southern Spain. Like her mother, Gerónima married a Spaniard who was sent to St. Augustine as a soldier. Widower Francisco Navarro arrived in early 1724, and he and Gerónima married in June of that year.[8]

In the joint will with her husband written six weeks before her death in 1737, Gerónima, "sick in body but sound of mind," claimed ownership of a home and provided the legal description of its lot near St. Augustine's fort. Both spouses declared that the other was to be their "universal heir." A year and a half after her death, Francisco married a thrice-widowed St. Augustine woman. We do not know in what house this newly formed couple lived or if the new wife brought any of her own children to join Francisco and Gerónima's eleven-year-old son, Juan, and nine-year-old daughter, Juana.[9]

In 1745, at age sixteen, Juana Navarro married another man from southern Spain, though he was a merchant, not a soldier. Florida's transfer to Great Britain in 1763 forced Juana and her family to abandon what had been her mother's house.[10] In October 1763, Juana; her husband, Salvador de Porras; the couple's ninth child, a five-week-old baby; and as many as six other surviving children boarded the brigantine *San Antonio* bound for Havana. The middle child, ten-year-old Catalina, would return after 1784, when Spain regained Florida, bringing her own children to Gerónima's house.[11]

Across the street, similar events took place at Victoria Escalona's home site. Victoria lived on a corner with the north wall of her house bounded by the lane that dead-ended at Gerónima's fence. In 1743, the widowed and apparently childless Victoria married a soldier from Spain, Martín Martínez Gallegos. Later events suggest that Victoria might well have provided this house, a dowry from her first marriage, for the new marriage. Like Gerónima, she died long before her husband. By virtue of Victoria's dowry, Victoria's surviving children and their guardian-father were entitled to continue

living in her house. Before the first anniversary of Victoria's death, her widower buried two of their four or five children within a period of four days. He then married again, choosing not a St. Augustine native but a member of a recent group of German Catholic immigrants who had settled in St. Augustine. Victoria's widower was able to offer his new bride a home in the house provided by his deceased wife because it was the home of his motherless children. This composite family, including children of the new marriage, also sailed for Cuba in 1763. In January 1764, Juan José Eligio de la Puente compiled a map to depict property ownership in St. Augustine at the time of the evacuation of Spanish residents (figure 2). He listed the remarried Martín Martínez Gallegos as the owner of the house and lot. Yet the property claim made twenty years later in 1784, with its deeds, affidavits, and other documents, showed that the ownership rested with Victoria's lineage. Victoria's sister, Lucía, also a 1764 evacuee, returned from Havana in 1784 to reclaim the property for Victoria's children. Lucía presented a preevacuation resident who testified that there had been "no other resident or owner than Victoria Escalona," indicative of a dowry ownership in the home.[12]

Documentary Sources

In peace negotiations to end the Seven Years' War (1756–63), Spain gave up its Florida territory to ransom British-held Havana. Florida's cession to Great Britain ended two hundred years of Spanish occupation of the peninsula and the Southeast. (In 1763, however, Spain acquired Louisiana from France by the same peace agreement, so the Spaniards retained a presence in the southern part of North America.) The departure of Florida's Spanish residents between June 1763 and late January 1764 meant the departure of the documentation of their lives as well. The emigration of 1763–64 was the first of several generated by treaty cessions and associated relocation of documents. In 1784, British subjects departed as the Spanish returned to the Florida peninsula, rewarded for declaring war on Great Britain during the American Revolution. In 1821, Spain permanently divested itself of Florida, this time to the United States.

Departing Spanish officials transferred the military and civil records, some of which went to the Office of the Exchequer in Havana.[13] Some of the documents were stored in other government buildings in Cuba. Official correspondence also rested in other locations, as copies of reports and letters sent from Florida were often sent to administrators in Spain, Cuba,

Santo Domingo (now the Dominican Republic), and New Spain (now Mexico). In addition, copies of important letters and reports were sent on more than one ship to guard against loss from shipwreck or water damage. Muster rolls for the St. Augustine garrison offer information about age, birthplace, parentage, physical infirmities, and annual salary. Over time, information in muster rolls changed—from concern in the 1690s with weapons and soldiers' disabilities to details on salaries, postings and vital statistics information in the middle of the 1700s.[14]

The Roman Catholic Church's records of baptisms, confirmations, marriages, and burials were also removed to Havana—in this case, to the cathedral.[15] The records of St. Augustine's Roman Catholic parish provide the most nearly complete data on the individuals who resided in Spanish Florida and encompass all ages, races, occupations, and social groups. An entry in the parish records often was the sole documentary evidence of an individual's existence in the world. The church, not the state, recorded information that today is considered vital statistics. The St. Augustine parish registers have the distinction of being the oldest written records of American origin in the United States. Continuous records exist for the period from 1594 to 1763, except for a hiatus between 1638 and 1643. For some periods, the parish records offer only minimal information. In the eighteenth century, however, the Enlightenment appreciation and appetite for facts revealed itself in the expansion of church records, which began to include information about the parentage of marital partners, previous spouses, and sometimes occupations. The parish records of baptisms, marriages, and burials for the middle third of the eighteenth century offer a good deal of information about familial and fictive kinship. Many burial entries after 1735 mention wills made by the decedents, but the wills themselves have not been located.

Personal documents from Florida's first two centuries of European settlement are largely unavailable—either nonexistent or at least undiscovered. Most evacuees in 1763 carried their important papers—deeds, wills, debt documents—with them to their new homes in Cuba or Mexico. When Spanish subjects returned to Florida twenty-one years later, they complained that "ownership papers had been lost by virtue of the evacuation," possibly referring to "kitchen documents," which had not been copied into official record books or into notarial records. Unlike the transported governmental documents, organized and stored under official auspices, it is likely that the personal documents stayed with their owners and thus physically were dispersed. Given the refugee mode of life experienced by the evacuees,

documents often survived the series of relocations no better than did their owners, who died in substantial numbers in Cuba.[16] While researchers lament the absence of the documents, some agreements, such as dowry arrangements, may well never have been recorded in official archives or may not have been retained as long as other documents. Other agreements may have been verbal only. According to anthropologist Ruth Behar, family or personal agreements in the province of León in Spain were considered just as binding as those that were recorded. Behar also states that many documents were not retained beyond a period of reasonable usefulness. "Most villagers throw away records that involve people whom they no longer remember. . . . [T]he records are mainly of interest if they have some bearing on the present." But one might ask how a contracting party could be prescient enough to anticipate the useful life of a document several generations into the future.[17]

The changes of sovereignty created a need for inventories, maps, and documentation that otherwise might not have been ordered and effected. In fact, Florida's changes of flag generated documentation to clarify situations and establish land titles. The periods of departure and arrival of governments and residents offer clusters of documents, which were not created with the same intensity during more stable times. The content and form of the records changed over time. One sort of information ceased to be recorded only for some other concern to appear.

The somewhat schematic map drawn by Juan José Eligio de la Puente in 1764 is the earliest known document of property ownership for the entire town. The map indicates owner's name, parcel size, and construction materials of the main building on the lot. Pablo Castelló, an engineer and mathematician, more clearly portrayed the physical reality of the town on his 1763 map, but he provided no listing of private landowners. In the absence of property records and other legal documents, Eligio de la Puente's map has served as almost the sole source for analyzing St. Augustine's land use and ownership in the first Spanish period (1565–1763).[18]

The primacy of the 1764 map made by Eligio de la Puente has obscured the role and ownership of women in home sites.[19] For example, Eligio de la Puente listed the house that Catalina de Porras would reclaim on behalf of her mother, Juana Navarro, under the name Salvador de Porras, Catalina's father. Eligio de la Puente apparently used the criterion of the husband as head of the household in identifying the property ownership to the world outside the family. Perhaps the ad hoc manner in which Eligio de la Puente

was forced to prepare his map in the face of evacuation left little time for careful research into ownership. Eligio's focus was the sale of abandoned property to the arriving British so that evacuees might salvage some money from their situation to support themselves in Cuba. Of the named property owners, 40 percent (80 of 203) were women, although women owned only 24 percent of the individual parcels (85 of 350). Eligio de la Puente's list explicitly depicted substantial female ownership of property, even without considering the obscured owners. Although a minority, women formed a significant portion of the property owners in St. Augustine.

Female Property Owners

Women were prominent among the claimants for family lots after 1784. Although property maps drawn in 1764 (at the time of evacuation) and the map drawn by engineer Mariano de la Rocque in 1788 (after the Spanish returned) frequently listed male owners of lots, further investigation of claims records shows that female family members were often the agents of transfer of ownership.[20] The practice of female property control comes into focus when the phrases pertaining to ownership in repatriated personal documents are examined in conjunction with kin relationships, which can be charted from the Catholic Church's records of baptisms, marriages, and burials and the maps. Spanish women retained their surnames after marriage, a practice that assists in tracing the lives of individuals. Children usually used their fathers' surnames but could choose their mother's name (if it were more illustrious) or even that of a grandparent for any higher status it might confer.

Reliance on maternal property even into the second era of Spanish presence in Florida (1784–1821) illustrated the tradition's strong roots among Florida families. When Catalina de Porras came back to her birth town in 1784, she intended to reclaim the lot where her mother and her grandmother had lived. The documents she offered to support her claim refer only to the ownership interest of Catalina's mother, Juana, with no mention of any claim by Juana's brother, Francisco. Juana's brother was also a child of Gerónima, and he had survived to adulthood and married; thus, he might have been an heir under equal distribution of an estate. The British-period occupants of the property of Catalina's mother balked at vacating voluntarily. Catalina's husband, representing Catalina's mother in the legal proceedings, presented Grandmother Gerónima's will as testimony of the family's ownership. As in the case of Catalina, although ownership was affirmed for old Florida claim-

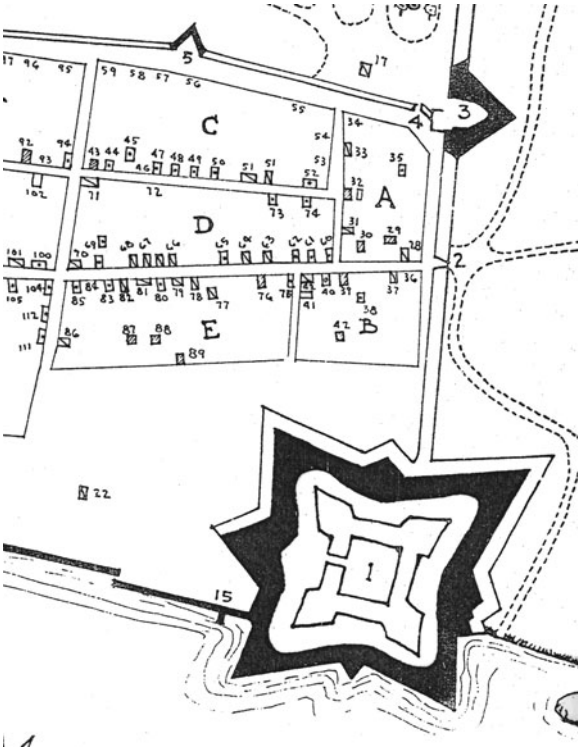


FIGURE 1. Northeast section of St. Augustine depicting home sites and Castillo de San Marcos (#1), January 22, 1764. Plan of San Augustine by Juan José Elixio de la Puente in Royal Depository of Hydrography, Madrid, hand drawn by Buckingham Smith, July 21, 1858.

ants, some adjustments to the property lines were made to accommodate residents who had moved onto the lands during the British years and stayed on after the Spanish returned.

Unlike Catalina, neither the daughter nor the son of Victoria Escalona chose to return to Florida from Cuba in 1784. Victoria's younger sister, Lucía Escalona, however, sailed back to St. Augustine to claim the corner property on behalf of her niece and nephew and subsequently to live there herself. This rather brash aunt appeared at the lot where Victoria had lived until her death and astounded the occupant, a man who had been paying rent for years to a self-proclaimed owner, by ordering him immediately to vacate. A wooden house that the occupant had built now sat on the property, for Victoria's masonry residence had not survived the intervening years. So Lucía moved onto the lot and into the new house. There is no mention of claims to the property by Victoria's husband or by any of the children born of his subsequent marriage. The property apparently was Victoria's to pass on to her children.[21]

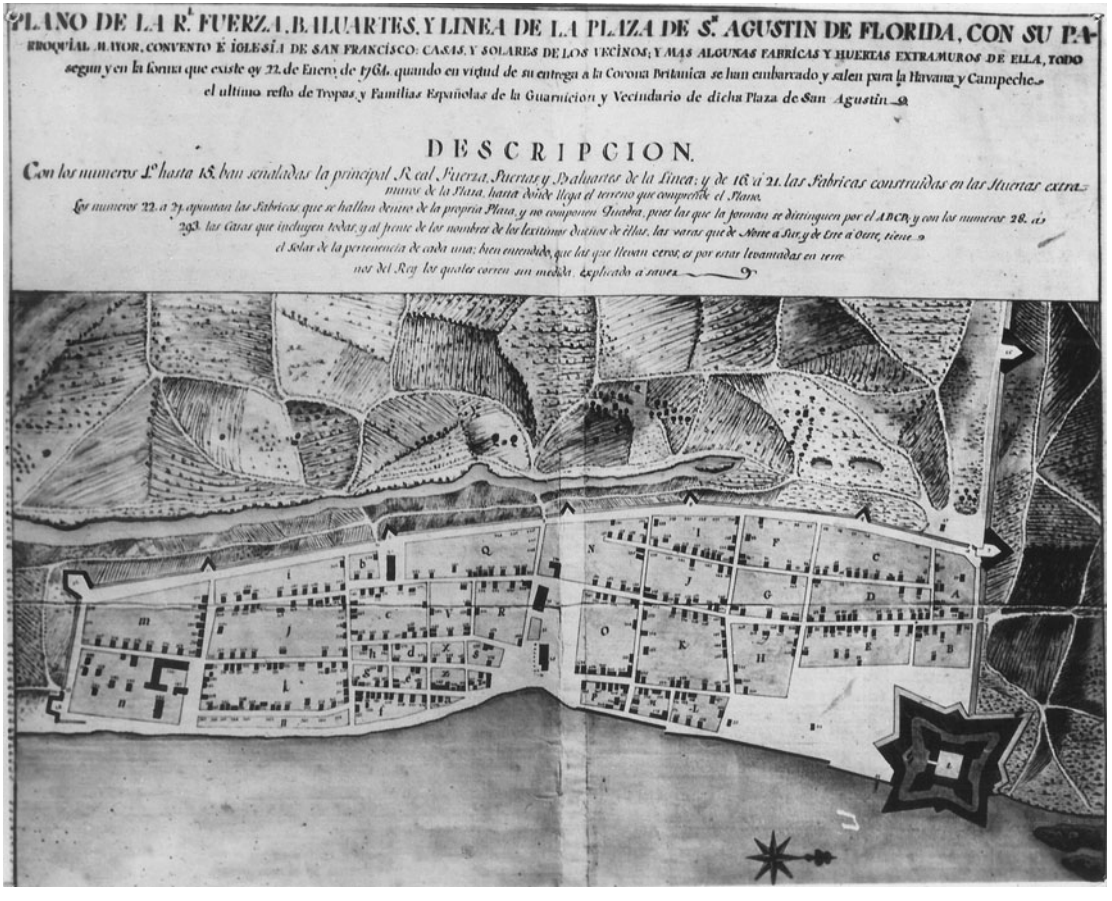

PLANO DE LA R.L FUERZA, B.LUARTES, Y LINEA DE LA PLAZA DE S.T AGUSTIN DE FLORIDA, CON SU PA-
ERROQUIAL MAYOR, CONVENTO E IGLESIA DE SAN FRANCISCO: CASAS Y SOLARES DE LOS VECINOS; Y MAS ALGUNAS FABRICAS Y HUERTAS EXTRAMUROS DE ELLA, TODO
segun y en la forma que existe oy 22. de Enero de 1764. quando en virtud de su entrega a la Corona Britanica se han embarcado y salen para la Havana y Campeche
el ultimo resto de Tropas y Familias Españolas de la Guarnicion y Vecindario de dicha Plaza de San Agustin
DESCRIPCION.
Con los numeros 1.os hasta 15. han señaladas la principal Real Fuerza, Puertas y Baluartes de la Linea; y de 16. a 21. las Fabricas construidas en las Huertas extra-
muros de la Plaza, hasta donde llega el terreno que comprehende el Plano.
Los numeros 22. a 27. apuntan las Fabricas que se hallan dentro de la propria Plaza, y no componen Quadra, pues las que la forman se distinguen por el ABCD, y con los numeros 28. a
293. las Casas que incluyen todas, y al frente de los nombres de los lexitimos Dueños de ellas, las varas que de Norte a Sur, y de Este a Oeste, tiene
el Solar de la pertenencia de cada una; bien entendido, que las que llevan cerco, es por estar levantadas en terre-
not del Rey los quales corren sin medida. Explicado a saver

FIGURE 2. Plan of San Augustine by Juan José Elixio de la Puente, January 22, 1764, in Royal Depository of Hydrography, Madrid.

The stories of these two sites illustrate the practice of succession of female ownership of real property that occurred among numerous families in Spanish St. Augustine. In the earliest of the records studied, Micaela González in 1727 sold the house inherited from her parents. Isabel Rodríguez entered her second marriage in 1733 with family real estate, which she had acquired at the time of her first marriage, four years earlier. Being consistent, Eligio de la Puente's map listed Isabel's second husband as the owner.[22] In 1763, Doña Beatriz Amadora, bound for Cuba, abandoned the site that was the "legacy of [her] ancestors."[23]

Charles W. Arnade recognizes this female participation in property conveyance in St. Augustine through his study of the Avero family, with its many daughters and sufficient land to accommodate them all. Four of the Avero sisters owned lots that either faced each other or were contiguous. Eligio de la Puente listed the lots of the widows, Antonia (#81) and Alfonsa (#66), in their own names, while the lots of Ursula (#67) and Juana (#80) appear under the names of their husbands. The lots might well have been distributed from land of their mother, who had married their soldier-father, a Canary Islander, in 1711. Arnade identifies the larger parcel from which the girls' land was divided with their great-grandfather, based on the inclusion of the great-grandfather's name, Juan de Peñaloza, in a 1709 government appraisal of buildings damaged or destroyed during the 1702 siege by an English invading force from Carolina. The 1709 list provides a succinct description of construction material, evaluation, and the owner but not the location of the damaged properties. The land passed to a daughter and subsequently to her daughter. In light of this sequence of property transfers and Eligio de la Puente's listing of husbands rather than their wives as owners, Arnade's reference to the Peñaloza "patrimony" and to the "patriarchal building" focuses mistakenly on male rather than successive female ownership. Arnade does not take into account the laws in place in Spain's colonies and refers to "Spanish tradition" and "custom" regarding inheritance. But there was no single "Spanish" tradition emanating from Iberia, for the regions of Spain had differing traditions and procedures regarding inheritance.[24]

This diversity in inheritance traditions is evident in the Spanish provinces of Galicia and León. Allyson Poska avers in her study of female property owners in Galicia that "for most Spaniards, one concept dominated the transfer of property from one generation to another: partible inheritance, in which, at least in theory, all legitimate children, both male and female,

inherited equal portions of the family estate." In Galicia, with its heavy emigration of males in the early modern period, many women never married. Inheritance practices adapted to this sex imbalance to provide for single women. Poska notes that a combination of Castilian law and Galician inheritance custom provided the spinsters with the needed resources. Many of the men who departed Galicia never returned, which in turn made available the emigrants' portion of immovable property to support the women, a situation almost the converse of St. Augustine, where Spanish men arrived as soldiers. Behar describes how the "idiom of equal inheritance" in the province of León, if carried to extremes, could result in siblings' dividing the house into ownership sections and even the assigning of ownership of individual construction elements, such as the front door.[25] The colonial law as it prevailed in the Americas, however, was based on antecedents of the Castilian region. The colonies were the property of the Crown of Castile. Thus, persons arriving from Iberia might find themselves faced with colonial laws that did not quite fit with or support their various traditions and expectations about residential and inheritance practices.

In St. Augustine, these inheritance practices worked to the advantage of women within the Avero family. One of the Avero sisters, Ursula, reclaimed her two-story house in 1785. She again put the house and lot to use as a dowry, this time for her daughter's betrothal to a Spanish army officer. Ursula, then in her sixties, remained in Havana while she continued the St. Augustine practice and tradition of endowing her daughter with a house.[26]

Amy Bushnell asserts in *The King's Coffer* that the usual dowry in St. Augustine was a house.[27] Bushnell relies on Arnade's assessment of the Avero family. Although Arnade's conclusion that real estate served as dowry is plausible, reasonable, and probably correct, it is a speculation nonetheless; the documents he employed do not specifically indicate the creation of dowries or even imply that legal activity. Evidence of such behavior in one family, which happened to have numerous daughters, was not sufficient to support a broad statement. In the interest of fairness to Arnade, he was among the earliest researchers of property in St. Augustine, working in the late 1950s and early 1960s, and his work predates most of the historiography on the role of women. This work provides detailed evidence to back up Arnade's premise by demonstrating that this inheritance practice was common among a much larger group than just a single family.

The institution of dowry recognized women's weak economic position in society. Fathers and guardians were required to endow their daughters or

female wards at the time of marriage if the men had the means to do so. The main purpose of the dowry was to enable the woman, if widowed, to maintain a household separate from her parents or siblings and to assist with the future family. A dowry remained the property of the married woman, although her husband controlled it. Any income her dowry might generate was at his disposal, for he was the legal custodian of his wife's dowry. However, a woman recovered control of the dowry at her husband's death. If she predeceased him, her children inherited the dowry; if she died childless, it reverted to her parents. Real property was not the usual corpus of a dowry in Spain or its other colonies: jewels, slaves, furniture, clothes, and silver were customary. A dowry of a proprietary government office assured many a colonial woman of a good marriage throughout Spanish America, as it did in early St. Augustine for women from the most influential or well-to-do families. In the case of St. Augustine, an important position in the military could also serve as a dowry. The female owners of proprietary offices or military positions did not fill the offices but made them available for husbands, thus providing an income and status for the family. Bushnell points out that Juan Menéndez Marquez became treasurer when he was betrothed to the daughter of the former treasurer. Nicolás Ponce de León II became sergeant major when he married the illegitimate daughter of Sergeant Major Eugenio de Espinosa.[28]

Tradition as well as the economic means of the bride's family determined the contents of the dowry, according to historians Asunción Lavrin and Edith Couturier, who have examined dowries in the same period for Guadalajara and Puebla, Mexico. The local situation in St. Augustine made a house a pragmatic choice for a dowry for most of the town's population, and tradition helped reinforce these practical decisions. A town that depended on the military budget did not generate wealth to provide brides with jewels, fine clothing, and silver plate. Moreover, what new couples needed in St. Augustine was a place to live. In these circumstances, a lot, preferably with a building, was an asset that a family could afford to endow a daughter and a resource that was not available to a prospective son-in-law who was a soldier from elsewhere. The disposition of the houses of Victoria Escalona and Ursula de Avero implies that the properties were dowries. The passage of control from the deceased Victoria to her children in the one case and the conveyance solely by the widowed Ursula de Avero in the other instance illustrate the clear-cut separation under colonial law of a woman's own property (*parafernales* and dowries) from the assets accumulated during the

marriage (*gananciales*). Had the houses been jointly owned by the marital couples, the ownership would have been divided among the surviving spouse and the children of the deceased. Only Victoria's two children, not any of their father's other children from his subsequent marriage, reclaimed the house in St. Augustine. Ursula de Avero acted as sole owner in the disposition of the house to provide a dowry for her daughter, with no reference to any property claims of Ursula's other children by either of her two deceased husbands. Ursula also pledged the house that she had left behind in St. Augustine as collateral for her daughter's dowry of seventy thousand copper reales in 1785. Ursula's use of her house for her daughter's dowry was particularly telling in light of the fact that her son (the girl's brother) was stationed in St. Augustine at the time, yet Ursula used the house for the daughter's benefit.[29]

Men of advanced age who had outlived several wives and many of their own children would incorporate into their wills the chronology of events by which they had become owners of houses provided by their wives. The need to include these details implies that the ownership of property provided by wives or their families was not the expected practice, and men therefore had to prove the legitimacy of their ownership and bequests. Wills of this time included information on the history of ownership of property and explanations of accounts payable and receivable and of debts satisfied long before the making of the near-death will. Testators carefully set forth the reasons that they no longer owned particular assets and thus could not bequeath them. Longevity usually meant several marriages, so bequests required detailed explanations to substantiate the validity of ownership or the disposal of properties that had come to the widowers through dowry.[30]

Francisco Menéndez Marquez, the colony's longtime accountant, explicitly attested to the practice of men verifying the ownership of homes by women in their family, stating that his daughters were provided houses at the time their of marriages. Itemizing his assets and debts in his 1742 will, drafted near the end of his life, Menéndez Marquez stated that he gave houses to the two eldest of his five daughters when they married: "I declare that when my daughter Doña Manuela married Don Antonio Urbano de Melo, I gave her a house and lot, the value of which at the time could be ascertained by the records which are now in the custody of Don Antonio." The statement that the papers were in the custody of his son-in-law suggests that the documentation of the dowry would not be found in official records, such as notary books. In the next paragraph, Menéndez Mar-

quez "declare[d] that I gave another house to my daughter Doña Gerónima when she married Don Pedro Horruitiner. The price for it is listed in the afore-mentioned ledger, and the site where the house is located cost me 100 *pesos*." His three youngest daughters received slaves, horses, a velvet cloak, and earrings—the family's town real estate no doubt was depleted by the time the younger girls wed. Menéndez Marquez noted that when his son, Francisco, married, he had been given "a negro boy, Florida born, named Felix, worth 100 *pesos* and two cows worth 25 *pesos*." At the time of their marriages, the daughters had received gifts valued at two to three times that of the son. However, Menéndez Marquez had retained productive lands, such as the cultivated lands of Araquei, which he had purchased. In addition, his family held cattle-ranching lands that passed through several generations of Menéndez males.

Moreover, Menéndez Marquez's wives had brought houses when they married him. His first wife, Doña Antonia Basilia de León, brought real estate into the marriage, but it was lost "as a result of the enemy's invasion" (the English siege of 1702). Menéndez Marquez and his second wife had no children, and with her father's consent, she willed to her husband her "maternal legacy." That Menéndez's father-in-law had to agree to the bequest suggests that the "legacy" was a dowry to which he had some right of use. Menéndez Marquez's third wife provided a small tabby house with a palm thatch roof when they married.[31] Like marriage practices explicitly described by Menéndez Marquez in his will, St. Augustine resident Juana de Sepúlveda brought to her marriage to Domingo de Escalona a house "inherited from her parents." Her widower found it necessary to clarify the ownership situation of the home site in his will even though the "small house roofed with thatch" was no longer part of his assets. After their house burned, the couple sold the lot.[32]

The pattern of maternal or uxorial preeminence associated with home sites is likewise set forth by Artillery Sergeant Fernando Rodríguez, another elderly widower with several marriages. Rodríguez, a native of Galicia, came to Florida as a soldier. By the time he made his will, he was the owner of property that had originally belonged to his mother-in-law, Lorenza de Salas. She provided a home site as a dowry when Rodríguez married María de los Reyes. The sergeant noted that his mother-in-law had declared that when Rodríguez died, the property was to revert either to her or to her daughter or her daughter's heirs. By the time that Rodríguez made his will in 1762, Salas, María de los Reyes, and the couple's son had already

died, leaving Rodríguez with no female heirs or immediate kin through his wife's family line. Rodríguez outlined the chronology of these deaths, which allowed him to become the owner of the dowry home site and thus to bequeath it to a legatee of his choice. The home site went to Rodríguez's "universal heir," his neighbor, Antonia de Avero, who was designated to receive the remainder of his estate after specific bequests had been honored and debts paid.[33]

Straightforward inheritance is another explanation of the passage of property, and the documents examined contain specific references by women to legacies from their parents. Spanish colonial law, based on the laws of Castilla, provided consistency, at least in theory, unlike the variety of laws in the British American colonies north of Florida.[34] Castilian and therefore colonial law did not favor the right of primogeniture, which prevailed in some areas of Spain itself, but instead prescribed equal (partible) inheritance among the children and the spouse. In her study of Galician inheritance practices, Poska notes that while testators might declare their desire for equality, they usually did not delineate how parity was to be achieved. She posits that the details of property distribution might have been hashed out in family negotiations prior to the testator's death. A testator could favor a spouse or a particular child with a larger portion (the *mejora*), but only within legal limits that protected the other heirs. Historian Silvia Arróm explains that in Mexico City in the early nineteenth century, "the law favored the right to inherit over an individual's freedom to bequeath." Poska finds that Galician daughters, especially single women, often received a *mejora*, citing studies of eighteenth-century coastal areas of northwestern Spain by Hilario Rodríguez Ferreiro that reveal that 84 percent of *mejoras* went to women. Because of high rates of male emigration out of Galicia, sons were potentially unavailable as heirs. There is some similarity between that region and the situation in Florida, where locally born men might find themselves disqualified for a space in the military. As a livelihood in Galicia, fishing likewise influenced family inheritance strategies, since "men set sail in the morning, but did not always return." *Mejoras* (extra portions of inheritances) were "nearly always . . . a *quid pro quo* exchange of a service," usually the care of a parent. Poska notes that *mejoras* were usually included in wills, but some were created by separate legal documents dictated well before the testator's death, making the conditions of an additional bequest clear to all the parties involved. Poska describes the *mejora* as "more a rural, than an urban phenomenon," a contrast with the character of St. Augustine.[35]

In his study of eighteenth-century merchants and mining, David A. Brading finds the equal division of family assets to be detrimental in Mexico, where formerly viable commercial enterprises suffered as their ownership became fragmented through partible inheritance. Although St. Augustine had no fortunes to sunder on the Mexican scale, the use of the dowry as an advance legacy to provide a home precluded multiple and potentially conflicting ownerships of residences originally intended to accommodate one family. A dowry was often considered an advance inheritance, thus some references to legacies in the St. Augustine documents might well refer to legacies as dowries. The descriptions by elderly widowers regarding reversion of property to parents of their deceased spouses or to property to be held in trust for minor children of a dead mother or references to consent required from a deceased wife's father imply a typical and codified dowry situation rather than just postmortem inheritance.[36]

Spain's Imperial Needs Create Local Legal Effects

Providing new families with access to land for a home was a logical solution to the situation that developed in St. Augustine after 1680, as increasing numbers of soldiers migrated into Florida. Previously, Spain had not replenished Florida's troops, and local men staffed the garrison despite directives by the Crown to the contrary. Royal orders had allowed native-born soldiers only as a stopgap when military units fell below strength. But in the absence of incoming replacements, both the military and local women chose locally born men. The situation changed after 1680, when Spain's outlying colonies came under increasingly severe attacks. Spain was already in the process of bolstering its defenses throughout the Caribbean in response to incursions by other nations when corsair Robert Searles raided St. Augustine. According to historian Paul Hoffman, the shouts of the "buccaneers in the streets of St. Augustine in the early morning hours of 29 May 1668 awoke not only the sleeping population but also the imperial government." The raid served as the proximate cause for enacting improved defense measures specifically for Florida. In March 1669, Mariana, queen regent of Spain, ordered funding for the construction of a masonry fortification at St. Augustine. The Florida colony would no longer be guarded by impermanent fortifications like those that had rotted, burned, or collapsed over the preceding hundred-plus years. A month later, Mariana commanded that the viceroy of New Spain (Mexico) fund the St. Augustine garrison at its full force of three

hundred men. But orders from Spain for a better defense did not prevent the English from establishing a settlement about three hundred miles north of the Florida capital in 1670. Spain and its Florida colony now faced a permanent (and inimical) English presence at Charles Town and the Carolina colony, which were too close to the Florida peninsula for Spanish comfort.[37]

Spain boosted the strength of its Florida fighting forces. Natives of the Iberian Peninsula and Mexico began arriving in increasing numbers. Fifty soldiers came with Governor Juan Marqués Cabrera in 1680. Marqués Cabrera, who was more contemptuous of Creoles than any other governor, began a determined program of dismissal of Florida natives until the garrison reached an all-time low in manpower. Marqués Cabrera began his term of office in Florida on November 30, 1680, and began dismissing Florida-born soldiers within a week. Marqués Cabrera dismissed Manuel Naranjo and Francisco de Cáceres from service on December 5. The next day, the governor replaced Juan Gutiérrez with a recent arrival from Sevilla. Lieutenant Francisco Bernal Castillo headed to Havana for military service when the governor eliminated him from the garrison. Florida residents continued to watch the governor remove local men from the army and cast them into the world of the unemployed. Reports from that time provided a chilling message to local families: "Se le borró su plaza" (his man-space was erased).[38] Within eighteen months, Marqués Cabrera had mustered out fifty-three locals who were in military service at the time of his arrival. His targets also included those whom no army would tolerate: deserters, the chronically ill, and a few who had enlisted when underage.[39] Marqués Cabrera then shanghaied an additional thirty-eight Spanish troops for Florida service in 1684, and thirty more men arrived the following year.[40] As this trend continued, Florida-born men might have chosen to leave the colony to find a livelihood; home sites in Florida would be of little use to them in absentia.

Most of the soldiers who began arriving in 1680 were natives of Spain. Spanish military historian Juan Marchena Fernández has noted that the relocated troops debarking at St. Augustine were from Mexico, but examination of individual-level documents—parish records, which include place of birth, and the 1751 roster of the troops—suggests that the men were natives of the Iberian Peninsula. Marchena Fernández relies on higher-level reports, plans, and orders, which probably indicated that the men had come to Florida from their previous deployment in Mexico, although that was not their native land. Most of these men were from Castilla (central Spain) and Andalucía (southern Spain), unlike the influential descendants of La

Florida's founding elite, who came from Asturias, in northwestern Spain. With colonial law modeled on Castilla, the soldiers from that area should have been familiar with the inheritance laws that applied in St. Augustine and perhaps were more amenable to the practice of establishing a home as a dowry, removing the home as an estate asset that might be divided into portions, as was the practice in some regions of Iberia.[41]

The 1670s and 1680s saw construction of the Castillo de San Marcos (Castle of St. Mark) to protect the north end of St. Augustine and provide a wide view of the entrance to the town's harbor. The construction of the masonry fort (today a national monument) encouraged settlement of the area near it, which had previously contained no white population, meaning that new arrivals might have been able to acquire larger parcels than in the older, settled part of town or several parcels at one time that could provide separate home sites for future generations. Gerónima Rodríguez and Victoria Escalona lived less than 750 feet from the fortress. The two women shared a grandmother and may well also have shared in a piece of the family property. Similarly, the Avero sisters owned homes facing each other across the Street of the Governor and in the same blocks as Rodríguez and Escalona.[42]

Anthropologist William Tulio Divale has observed that among less complex societies, matrilocality (or uxorilocality) is an adaptive response to disequilibrium that results when immigration occurs into an already inhabited area. Anthropologists Melvin and Carol Ember and Divale have discerned a positive relationship between matrilocality and external warfare. The requirements of external warfare were St. Augustine's raison d'être. The external warfare system fueled the town's economy and devoured its sons.[43]

St. Augustine's population turned to the female element of society in the face of the disequilibrium resulting from a relatively large male immigration. For example, the 118 men arriving between 1680 and 1685 equaled more than 37 percent of the garrison, which had previously been composed of local men. The introduction of so many men contemporaneous with the construction of the fortress and its need for additional laborers exerted housing pressures that had not previously existed. Researchers investigating the physical evolution of colonial St. Augustine have attributed the spreading of the town into the northern side of the central plaza to the advent of the Castillo de San Marcos, but the demographic changes no doubt played a part in the creation of a residential area for Spanish families there, too. The body of colonial law already provided legal mechanisms and incorporated theories that enabled a solution to the problem through female access

to and residual control of property. Recently arrived, landless Iberians and men from areas of Spanish America surely opted for brides who could offer houses or at least lots on which to build homes.

As for the preferences of the brides, Iberian birth carried status throughout the New World. In St. Augustine after 1680, marriage to a locally born man could mean financial uncertainty as Governor Marqués Cabrera mustered out native-born soldiers. Thus, young women had a compelling reason in addition to status to choose *peninsulares* (Iberian-born men) over locals and to entice them with land. Of course, it is plausible that this local pattern of property transfer through female generations by creating a dowry or a *mejora* predated the 1680s, but the documentation regarding that earlier period is insufficient. Many of the arriving males were natives of Andalucía, where anthropologist David Gilmore has identified female-oriented residence patterns and the very influential role of mothers-in-law. So powerful was a mother-in-law's position that Gilmore labeled the wife's mother the bête noire of Andalusian husbands.[44] Perhaps such patterns and practices were both familiar and comfortable for many of the men who came to colonial Florida in the late seventeenth century and the first half of the eighteenth century.

Divale concludes that the female-oriented pattern "should be seen as specific, not general."[45] St. Augustine's pattern was a response to a particular set of conditions: a long-term influx of landless men and constricted area of settlement. But as a defensive post and military town, St. Augustine's conditions bore some resemblance to those in other towns whose primary function was to serve as protection for the Spanish empire or for other nations. Nor was the in-migration of males as soldiers into military towns restricted to the seventeenth and eighteenth centuries. The actions of St. Augustine's population might well be a particular version of a universal pattern, and we should be alert to similar legal responses in other predominantly military towns.

* * *

Divale and Ember and Ember have observed that among premodern societies, matrilocality or uxorlocality was a response to in-migration and external warfare. The same pattern can be seen in early modern Florida in the 1600s and 1700s—that is, men arrived, and women stayed generation after generation. Considering Florida, with its relatively high in-migration of men, together with northwestern Spain, with its relatively high out-migration, reveals that in the context of high migration in either direction,

women's control of land increased. Allyson Poska claims that "the single most important factor in the lives of women in early modern Galicia was the very high rate of male migration from the region."[46] The same can be said about male migration to Spanish Florida. Both regions used the mechanisms provided by the law to adapt to and resolve this problem. In Spanish Florida, the practice of matrilineal property conveyance assured housing not only for a soldier's family both while he lived and after his death but also for the soldier himself. A home that served as a dowry offered shelter to motherless children and to their father as their guardian.

The practice of female property control provided St. Augustine's Creole women with a security in widowhood not enjoyed by their counterparts in some of the British colonies to the north. In New England, widows in families that included adult male children might face an uncertain residential future, for sons were favored over wives in the bequeathing of real property in the seventeenth century.[47] Historians Marylynn Salmon and David Narrett observe that in colonial British America, "a married woman's power to will property was contrary to the orderly descent of land at common law."[48] While the female-oriented transfer of property in St. Augustine might be viewed as lessening the authority of the husband vis-à-vis that of the wife, the expectation and burden for the family's well-being were diffused among the wife's relatives, and the expectation that the husband would provide a home was diminished and absorbed by the wife's parents.

The society of Spanish Florida during its first two centuries developed in ways that differed from those in other areas of the Americas. Florida's differences lay not merely in the Iberian roots of its society and legal traditions but also in the fact that it did not become a colony with an export-based, agricultural economy, despite the founders' plans and hopes. The roles of work and labor and real and personal property developed within the context of Florida's economic base, wherein these assets served a different function than in an agricultural economy. Spanish Florida was a service-based, cash-based economy, unlike the more nearly self-sufficient, agricultural societies in British America and in other areas of Spanish and French America.

After the Spanish returned to Florida in 1784, St. Augustine had less need for the female-favorable property pattern. St. Augustine was no longer defined and circumscribed by the military. In the late 1700s, immigrants of many nationalities, especially citizens of the new United States, settled in the Florida colony, while other people just flowed through. A reorganized military regularly (at least in theory) rotated troops. As the years went by

the civilian population grew while the military force shrunk. Ursula de Avero's son-in-law was transferred to another post, eliminating the need for the residence that had for so long comprised a part of the family matrimony and that Avero had pledged as a dowry (collateral, in this case) when her daughter married.[49]

But the pattern nevertheless persisted because it had been firmly planted in the worldview of the *floridano* families who reclaimed their property in the second Spanish period. Francisca de Hita, the daughter of Juana de Avero (and Ursula's niece), returned from Cuba and moved onto her mother's lot on St. George Street (yet another parcel listed by Eligio de la Puente in 1764 in the husband's name).[50] Francisca's mother's house had since disappeared, replaced by a footpath. The validity of Francisca's claim to the right of way was too uncertain for her to risk investing in the construction of a house, so she planted orange trees as her act of possession. Across the street and a few paces to the north on St. George Street, the descendants of Gerónima Rodríguez still resided. When Florida was transferred to the United States in 1821, Gerónima's great-granddaughter, Manuela, owned the property of her maternal forebears. About to set sail for Havana, Manuela issued a power of attorney to sell the "small masonry house with its corresponding lot located . . . near the land gate." Eighty-five years had passed since Gerónima Rodríguez, "sick in body but sound of mind," had signed the will that described her home.[51] With the ships that carried Manuela, her kinsmen, and her neighbors to Cuba went those practices and procedures that Florida would no longer need in the agricultural economy of the U.S. South.

NOTES

1. Eugene Lyon, *The Enterprise of Florida: Pedro Menéndez de Avilés and the Spanish Conquest of 1565–1568* (Gainesville: University Press of Florida, 1976), 117. Lyon comments that the contract for La Florida was similar to other sixteenth-century agreements with the Spanish Crown, with differences more a "matter of degree than of kind" (54). Lyon's translation of the contract appears on pp. 213–19.

2. Murdo MacLeod, "Spain's Atlantic Trade, 1492–1720," in *The Cambridge History of Latin America*, ed. Leslie Bethell (Cambridge: Cambridge University Press, 1984), 1:341–88.

3. Charles W. Arnade summarized the Franciscan friars' position as being in favor of maintaining the colony of La Florida but abandoning the Florida peninsula in favor of an area located closer to the majority of the Indian population. "Geographical and nautical considerations, indeed recognized by the fathers, were of but minor importance"

in their point of view (*Florida on Trial* [Coral Gables, Fla.: University of Miami Press, 1959], 89).

4. Florida's protective role was often passive rather than assertive. Much of the time, Florida protected Spanish interests by depriving the British of a land base near the route of the silver fleets. In the second Spanish period (1784–1821), Spain viewed its colonies in the Southeast as a barrier to U.S. aggression toward Mexico.

5. MacLeod, "Spain's Atlantic Trade," 361; Engel Sluiter, *The Florida Situado: Quantifying the First Eighty Years, 1571–1651* (Gainesville: University of Florida Libraries, 1985), 1–2, appendix.

6. John E. Crowley, "Family Relations and Inheritance in Early South Carolina," *Histoire Sociale—Social History* 17, no. 33 (1984): 35–57, esp. 45, 51. Despite the plantation economy in English South Carolina, Florida's neighbor and nemesis, land was not perceived as the most valuable asset. Carolina agriculturalists perceived slaves as more valuable than land because slave labor was believed to be essential to the land's productivity. In addition, Charleston's role as an entrepôt gave commercial assets an important role in the colony's economy. The attitudes in this southern British colony were exceptional and differed greatly from those of the northeastern colonies and further evidenced that difference with favorable consideration of females as heirs and owners of land. See Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 157.

7. Will of Gerónima Rodríguez and Francisco Navarro, St. Augustine, February 4, 1737, Bundle 359, Doc. 1, East Florida Papers (EFP), Library of Congress Manuscript Collection, Washington, D.C. (microfilm copies at St. Augustine Historical Society).

8. Marriage of Gerónima Rodríguez and Francisco Navarro, June 6, 1724, Burial of Gerónima Rodríguez, April 8, 1737, Marriage of Gertrudis de Morales and Andrés Garrido, February 4, 1682, Marriage of Gertrudis Alvares de Morales and Jacinto Rodríguez, December 9, 1683, Marriage of Gertrudis de Morales and José Antonio Rodríguez, September 16, 1687, Cathedral Parish Records (CPR), Archives of the Diocese of Saint Augustine, St. Augustine, Fla.; Service Record of Teniente Don Francisco Navarro, trans. Luis R. Arana, Stetson Collection (SC), Archives of the Indies, P. K. Yonge Library of Florida History, University of Florida, Gainesville, 87-3-13/14 (microfilm copies).

9. Marriage of Francisco Navarro and Mariana Entonado, December 28, 1738, Baptism of Juan Navarro, April 5, 1727, Baptism of Juana Navarro, January 19, 1729, CPR.

10. Marriage of Juana Navarro and Salvador de Porras, February 8, 1745, ibid.

11. Baptism of Catalina Gerónima Rafaela de Porras, January 9, 1753, Baptism of Génera Antonia de Porras, September 9, 1764, ibid.; Claim of Juana Navarro, Bundle 320, Claims 15, 80, Claims for Town Lots, Spanish Land Grant Manuscripts (SLG), State Archives of Florida, Department of State, Tallahassee (microfilm copies at St. Augustine Historical Society). In "Report on Conditions of St. Augustine" (April 9, 1760, SC, 86-7-21/41), Juan José Solana stated that Porras was selling English dry goods and other things. Translations of the inventories of both parcels of real property attributed to Porras appeared in Charles W. Arnade, "The Architecture of Spanish St. Augustine," *The Americas* 18, no. 2 (1961): 175–79.

12. "Further Information on the Martínez Gallegos House," Block 7, Lot 1, Lot-and-Block File, Historic St. Augustine Preservation Board Collection, University of Florida Government House Collection, St. Augustine. The 1762 baptism of the child of Martín Martinez Gallegos and Isabel Serrano implies their marriage prior to that year. Isa-

bel is listed as a native of Germany. A settlement of Germans had been established in the nearby rural area in the 1750s. See Claim of Joaquín Martinez and Rosalía Martinez [children of Victoria Escalona] and Lucía Escalona, April 19, 1783, Bundle 320, Claim 79, Town Lots, SLG.

13. Pedro José Gómez's claim stated that Eligio de la Puente's papers were located in Cuba in the Office of the Exchequer (Tribunal de Cuentas de Real Audiencia). See Bundle 320, Claim 81, Town Lots, SLG.

14. The muster rolls of soldiers and those individuals paid by Crown funds were generally titled "General List" (*lista general* or *pie de lista*) and were sometimes signed by the governor and at other times sent in the name of a subordinate administrative official. The following musters in the SC were consulted: July 6, 1671, 58-1-26/16A; December 4, 1680, May 27, 1683, 54-5-12/9; June 28, 1683, 54-5-11/102 duplicate; April 20, 1687, 54-5-14/41; December 2, 1698, 58-2-3/25; September 1, 1699, 54-5-15/136; December 3, 1701, 58-2-3/34; December 3, 1706, 1707, 1708, 1709, 58-1-35/61; December 3, 1712, 58-2-3/59; December 31, 1714, 58-2-4/17; August 12, 1719, 58-2-4/25; June 3, 1717, 87-1-2/63; April 5, 1738, 87-1-3/20; 1740, 58-1-32/23; January 2, 1745, 87-3-12/70; January 12, 1746, 87-3-12/76; July 14, 1746, 87-3-12/84; January 23, 1747, 87-3-12/23; July 8, 17, 1748, 87-3-13/2; roster by José Gelabert, October 29, 1751, 87-1-14/2.

15. The Catholic Church Parish Records (now known as the Cathedral Parish Records) remained unnoticed until 1871, when the bishop of the Diocese of St. Augustine discovered them. Another thirty-five years passed before the parish records were returned to Florida. See Michael V. Gannon, *The Cross in the Sand* (Gainesville: University Presses of Florida, 1965), 191–92; Charles S. Coomes, "Our Country's Oldest Parish Records," *El Escribano* 18 (1981): 74–83.

16. José Miguel Chapuz, Claim for the House of His Mother, Beatriz Amadora, Bundle 320, Claim 62 [also numbered 298], Town Lots, SLG. Juan José Eligio de la Puente's correspondence to the governor of Cuba noted that many of the evacuees were dead by the date of his report, January 27, 1770. See SC, 87-1-5/4.

17. Ruth Behar, *Santa María del Monte: The Presence of the Past in a Spanish Village* (Princeton: Princeton University Press, 1987), 69.

18. Juan José Elixio de la Puente, "Plano de le Real Fuerza, Baluartes, y Linea de la Plaza de San Agustin de la Florida," January 22, 1764, Royal Depository of Hydrography, Madrid, Spain; Pablo Castelló, "Plano del Presidio de San Agustín de la Florida," July 21, 1763, Library of Congress, Washington, D.C. (original in Spanish Ministry of War, LM 8a-1a, copy at St. Augustine Historical Society).

19. This map is commonly denominated the Puente map, the title probably arising from an Anglophone interpretation of the mapmaker's name. This study uses the Spanish form, "Eligio" or "Eligio de la Puente," but not "Puente." His surname appears frequently in governmental and church records as "Eligio."

20. Mariano de la Rocque, "Plano Particular de la Ciudad de Sn. Agustín de la Florida," April 25, 1788, EFP (copy at St. Augustine Historical Society).

21. Claim of Joaquín Martínez and Rosalía Martínez [children of Victoria Escalona] and Lucía Escalona, April 19, 1783, Bundle 320, Claim 79, Town Lots, SLG.

22. Isabel's brother conveyed the property as administrator of their parents' estate. See Deed from Antonio José Rodríguez, executor of estate of José Rodríguez, to Bonifacio González, September 1729, Bundle 320, Claim 81, Town Lots, SLG.

23. Deed from Juan Méndez and Micaela González to José de Escalona, February 17, 1727, Bundle 320, Claim 75, SLG; Petition of José Miguel Chapuz, heir of his mother, Doña Beatriz Amadora, Bundle 320, Claim 62, Town Lots, SLG.

24. Charles W. Arnade, "The Avero Story: An Early Saint Augustine Family with Many Daughters and Many Houses," *Florida Historical Quarterly* 40, no. 1 (1961): 10, 13, 16.

25. Allyson M. Poska, *Women and Authority in Early Modern Spain: The Peasants of Galicia* (New York: Oxford University Press, 2005), 40, 44; Behar, *Santa María del Monte*, 72.

26. Petition of Tadeo de Arribas, son and agent for Ursula de Avero, January 11, 1785, Bundle 359, Doc. 2, EFP. His sister, María de Arribas, and Sublieutenant Pablo Catajal married on January 7, 1787.

27. Amy Bushnell, *The King's Coffer: Proprietors of the Spanish Florida Treasury, 1565–1702* (Gainesville: University Press of Florida, 1981), 18.

28. Silvia Marina Arróm, *The Women of Mexico City, 1790–1857* (Stanford: Stanford University Press, 1985), 62, 67–68. In "Dowries and Wills: A View of Women's Socioeconomic Role in Colonial Guadalajara and Puebla, 1640–1790," *Hispanic American Historical Review* 59, no. 2 (1979): 281, Asunción Lavrin and Edith Couturier assert that the "dowry represents the first legal acknowledgment of the woman's personality and the first time she is accorded possession of goods and property." See Bushnell, *King's Coffer*, 18; Della M. Flusche and Eugene H. Korth, "A Dowry Office in Seventeenth-Century Chile," *Historian* 49, no. 2 (1987): 204–22; Eugene H. Korth and Della M. Flusche, "Dowry and Inheritance in Colonial Spanish America: Peninsular Law and Chilean Practice," *The Americas* 43, no. 4 (1987): 401.

29. Lavrin and Couturier, "Dowries and Wills," 288; Arróm, *Women of Mexico City*, 67.

30. Arnade, "Avero Story"; Bushnell, *King's Coffer*. The research presented here illustrates and supports Bushnell's contention by addressing the patterns and mechanisms.

31. Will of Francisco Menéndez Marquez, September 2, 1742, SC, 58-1-34/73. A translation of this will can be found in Eugenia B. Arana, trans., "Burials at the Convent of Saint Francis, 1595–1763," *El Escribano* 5, no. 2 (1968): 8–12.

32. Will of Domingo Escalona, April 20, 1755, Estate of Domingo Escalona, Bundle 301P5, EFP.

33. Will of Fernando Rodríguez, July 1762, in Claim of Antonia de Avero, Bundle 319, Claim 19, Town Lots, SLG.

34. Salmon contends that the pervasive problem with studying property rights in early British America is the remarkable diversity of the laws: "No one ever envisioned a single colonial code of laws" because of the diverse situation in the home islands (*Women and the Law of Property*, 1).

35. Poska, *Women and Authority*, 49–50, 51 n. 38; José María Ots y Capdequí, *Manual de Historia del Derecho Español en las Indias y del Derecho Propiamente Indiano* (Buenos Aires: Losada, 1945), 112–77; Arróm, *Women of Mexico City*, 63; Lavrin and Couturier, "Dowries and Wills."

36. David A. Brading, *Miners and Merchants in Bourbon Mexico, 1763–1810* (Cambridge: Cambridge University Press, 1971), 103, 307.

37. Luis Rafael Arana and Albert Manucy, *The Building of Castillo de San Marcos* (n.p.: Eastern National Park and Monument Association, 1977), 13–15; Paul E. Hoffman, *Florida's Frontiers* (Bloomington: Indiana University Press, 2002), 143.

38. Musters for December 4, 1680, May 27, 1683, SC, 54-5-12/9; June 28, 1683, SC, 54-5-11/102 duplicate.

39. Report of Royal Officials, May 20, 1683, included in Juan Marqués Cabrera to the Crown, SC, 54-5-11/102B.

40. Luis R. Arana, "The Spanish Infantry: The Queen of Battles in Florida, 1671–1702" (master's thesis, University of Florida, 1960), 22–23, 78–84.

41. Juan Marchena Fernández, "St. Augustine's Military Society, 1700–1820," *El Escribano* 22 (1985): 54–57; roster by José Gelabert, October 29, 1751, SC, 87-1-14/2.

42. Archaeological evidence indicates the Euro-American settlement of the northern part of the town was contemporaneous with the construction of the fort. See Kathleen Deagan, *Spanish St. Augustine: The Archaeology of a Colonial Creole Community* (Orlando: Academic Press, 1983), 25; Albert Manucy, "The Town Plan of St. Augustine, 1580" (1977), Historic St. Augustine Preservation Board Collection.

43. William Tulio Divale, "Migration, Warfare, and Matrilocal Residence," *Behavior Science Research* 9, no. 2 (1974): 75–133; Melvin Ember and Carol Ember, "The Conditions Favoring Matrilocal versus Patrilocal Residence," *American Anthropologist* 73, no. 3 (1971): 571–94; Arana, "Spanish Infantry," 78–84.

44. Marchena Fernández, "St. Augustine's Military Society," 54–59; David D. Gilmore, "Men and Women in Southern Spain: 'Domestic Power' Revisited," *American Anthropologist* 92, no. 4 (1990): 953–58.

45. Divale, "Migration, Warfare, and Matrilocal Residence," 131.

46. Poska, *Women and Authority*, 21.

47. John Demos, *A Little Commonwealth: Family Life in Plymouth Colony* (New York: Oxford University Press, 1970), 75.

48. Salmon, *Women and the Law of Property*, 142–43; David E. Narrett, "Men's Wills and Women's Property Rights in Colonial New York," in *Women in the Age of the American Revolution*, ed. Ronald Hoffman and Peter J. Albert (Charlottesville: University Press of Virginia, 1989), 106.

49. Juan Marchena Fernández, "The Defense Structure of East Florida," *El Escribano* 21 (1984): 37–52; Marchena Fernández, "St. Augustine's Military Society," 77; Arrivas House File, Block 12, Lot 21, Lot-and-Block File, Historic St. Augustine Preservation Board Collection.

50. Claim of Antonia de Avero, Bundle 319, Claim 73, Town Lots, SLG.

51. "Historical Report for Block 7, Lot 4," Lot-and-Block File, Historic St. Augustine Preservation Board Collection; Power of Attorney from Doña Manuela Ponce de León to Don Pedro Miranda and Don Eusebio María Gómez, February 12, 1823, Deed Book E, p. 11, St. Johns County, Florida, Public Records; Payments to Don José María Gómez and to Doña Cipriana Gómez for Doña Manuela Ponce de León, October 24, 1812, February 6, 1817, Bundle 61-1-5, EFP.

The Law and Order Campaign in New Orleans, 1763–1765

A Comparative View

Thomas N. Ingersoll

IN THE SUMMER OF 1763, New Orleans authorities began an unusual crackdown on suspected criminals. The ensuing arrests, torture, convictions, and executions reveal an eighteenth century at its least enlightened and provide a context in which to explore several comparative themes. First, compared with the parish's immediate past and future, the crackdown was an isolated exception; it did not reflect routine judicial activism in Louisiana, for it was a product of sudden imperial flux. Those of the local planter class had achieved mastery and had rational hopes of postwar economic recovery, when suddenly a decision in Paris threw their basic legitimacy into doubt. Planters reacted with a little reign of local terror. Second, compared with slave treatment in other places in the New World, the proceedings show that local policy toward African Americans was typical, not more humane or less racially specific than elsewhere. Third, in contrast to the way treatment of African Americans was typical, the manner in which whites were treated was atypical: French law allowed the judicial torture of a white free man long after the English abolished that barbaric procedure. The torture of a white man would have been unthinkable in, say, Virginia in the 1760s. If it was equally unfortunate to be a black man on the Mississippi River or on the Chesapeake Bay, it was better for a common white man in Virginia than in Louisiana.

The New Orleans Planters as the Sudden Victims of Metropolitan Politics

New Orleans Parish was a slave society like the one in Virginia's Tidewater, in which the white minority arranged all of society to make sure the black

slave majority stayed in its place. New Orleans was distinctive in that for decades the system had not faced a serious threat, in part because the Atlantic slave trade to the colony all but ceased, so a majority of slaves were creoles in a relatively stable slave community by the 1760s. In 1763, however, France's sudden cession of Louisiana to Spain cast doubt on the foundations of the colony's legal authority. As a result, administrators directed an eager, demagogic prosecutor to come down hard on any and all suspects. Thus, a drastic geopolitical shift in Europe could have a disruptive effect on a remote society, one ruled by insecure planters who unleashed ferocious police power to convince everyone that their king's departure did not diminish the planters' authority.

The parish of La Nouvelle Orléans had a population of about twenty-four hundred whites and four thousand slaves and free blacks. Situated on a key crescent in the Mississippi River, it was a tiny, barely urban village closely surrounded by a plantation region, the seat of all the major institutions of the colony of Louisiana. Everyone in the plantation district resorted to judicial, administrative, and clerical authorities in the town center, so the population regularly circulated among the various neighborhoods. Since people of all colors came to the town center regularly to trade, worship, attend court, or socialize, they all knew one another on sight, more or less. A remarkable degree of social cohesion had been reached because only a trickle of new white settlers and black slaves arrived between the 1730s and the 1760s. Although some people were old enough to remember the dark, strife-torn years of the founding, there had been no uprising or drastic measures by the planter class against slaves since Louisiana became a royal colony in 1731. Nevertheless, the community was deeply divided because nearly two-thirds of the population was black slaves. The white people treated blacks with the same vigilance and use of force as armed white minorities used in all slave societies. The planters routinely ignored the few protective provisions of the Crown's Code Noir. Nevertheless, a relatively placid, highly creolized ambience had come to infuse the town. Thus, the law-and-order campaign was a break with the recent past; local young people had never seen the types of sanguinary, awful public displays of judicial rigor that occurred in the following months. The planters lashed out because they felt particularly vulnerable in the last days of the Great War for Empire.[1]

By contrast to planters in the English colonies, which had royally sanctioned but locally elected assemblies and magistrates, the Louisiana planters' government comprised only a handful of Crown-appointed officials backed up by a small garrison of the Crown's regular soldiers from France.

The planters' only instrument of control was the Conseil Supérieur (Superior Council), the officers who were or became resident planters if arriving from France, providing the colony with its administration and justice.[2] From the Crown's perspective, the council was a triumph of absolutist authority, free of the many other French judicial institutions that competed with royal courts at home in France.[3] Since the military governor general and the civil *commissaire ordonnateur* (a kind of intendant) did most of the administering, the councillors spent most of their service as a court in Gouvernement House on Toulouse Street. They settled local matters, especially debt and other civil actions among the planters and nonslaveholders to whom the planters were linked via financial and other ties. As a court, they also heard major criminal cases, abiding by the Crown's Criminal Code of 1670.[4] As a court, it was presided over by the *ordonnateur*, not the governor, and only some of the councillors sat as judges. In September 1763, the Superior Council decreed that the provincial *procureur général* (public prosecutor) was to attack supposedly widespread disorder, especially runaway slaves, who were to be rounded up and branded with a *fleur-de-lys* on the shoulder for a first offense, branded on the other shoulder and hamstrung for the second offense, and hanged for a third offense.[5] The young prosecutor, Nicholas Chauvin de Lafrénière, recently trained in France, began investigating.

The Superior Council's probe occurred at a time of great political uncertainty for the colonists. Though they heard rumors beginning in 1762, they did not know for certain until the fall of 1764 that Louis XV had given Louisiana to Carlos III. The colonists had escaped military action during the Great War for Empire, but now this.[6] The Crown tried to veil the loss of Louisiana by making scapegoats of the detested *ordonnateur*, Vincent de Rochemore, and the popular governor, Louis Billouart de Kerlérec, recalling them to the capital. Paris sent out an interim relief administrator, an *ordonnateur* declared to be the acting governor for the occasion, Jean-Jacques-Blaise d'Abbadie, who arrived on June 29, 1763. Suddenly, the colonists were saddled with a green, prim, overeducated French official who immediately began looking down his disapproving nose at the planters, whom he regarded as a lot of layabouts and degenerate gamblers.[7] Because of the great royal abandonment, the governor had no legitimate authority derived from the Crown, and there was no certainty that the soldiers of the tiny garrison could be depended on to rally effectively if need be. So how could slaves be kept in their place?

Then d'Abaddie received orders to reassign to Saint Domingue half the

newly arrived companies of fresh soldiers, weakening the colonists' first line of defense against attacks by Indians or slaves. He ordered the colonial militia to patrol to preserve order, an activity to which most planters were probably little accustomed.[8] Meanwhile, as if the Crown had not humiliated the Louisianans sufficiently, in 1763 it somehow found the financing to bypass them and assist a tiny struggling slave society, Guiana, by launching an immense colonizing project to Cayenne, although bureaucratic bungling soon killed three-quarters of the twelve thousand new settlers.[9] Providing still another shock, d'Abbadie followed Crown instructions to liquidate the Jesuits' establishment in Louisiana, a fine plantation lying along the upper boundary of the town center with one of the colony's largest slave forces, which was hastily auctioned off to secular planters.[10] Still another element in the general sense of confusion was the collapse of the local currency—mostly IOU's issued by the governor—as a result of Louis XV's 1763 bankruptcy.[11] Moreover, neighboring Dutch Guyana was undergoing the most successful slave uprising in the New World before 1791, the 1762 Berbice Rebellion by Coromantees, horrifying news of which spread through the entire Caribbean by September 1763.[12] Even more to the point for French colonists, the 1758 François Macandal slave conspiracy in Saint Domingue had initiated a prolonged state of unrest that unnerved the planter class throughout the French colonies. Finally, at the end of the Seven Years' War, the French Crown initiated a specifically racial policy to repatriate to the colonies blacks living in France and to forbid blacks to embark in America for the mother country. All French colonists were unhappy about these self-possessed and proud African Americans coming to the colonies. When Saint Domingue planters sold off a handful of undesirable slaves to Louisiana in July 1763, the Superior Council banned the introduction of any blacks from that colony as a potential infection of rebellion and followed with the September decree giving Lafrénière a free hand.[13]

In short, a sense of doom pervaded the atmosphere. D'Abbadie censored public discourse, banning any reference to the Spanish cession, fearing that bitterness about the transfer could lead to an insurrection by the planters, as it eventually did in 1768.[14] Then, amid the Superior Council's law-and-order campaign, d'Abbadie died early in 1765. His passing was unlamented, but it left the colony with neither of the two highest Crown officers. A Spanish governor, Antonio de Ulloa, appeared in 1766, but with no troops. Ulloa, a scientist, was on his way home from Latin America and probably was not happy about his assignment. He soon made members of the planter

class positively combustible, and two years later, they chased him from the colony in fear for his life, set up a transitional independent government, and implored Louis XV (in a highly legalistic manifesto) to take them back into his empire.[15]

In the fall of 1763, Lafrénière went on fact-finding tours among the plantations; the usual procedure was to take a court officer or two (the clerk and the bailiff) to the scene of a crime to open an inquiry.[16] By the end of the winter, he focused on thieves.[17] Perhaps two dozen head of cattle were missing, presumably eaten by runaways. The investigation finally focused on Pierre Degoute (called Fleury), Philippe Periche, Jacques, and Jacob, accused of being an interracial gang of rustlers. The case of *Degoute et al.* finally opened officially on March 7, 1764. On March 10, Lafrénière issued a summons to Sheriff Marin Pierre Bary for a man never identified beyond the name Jacques, probably an indentured servant of Degoute's.[18] On March 17, Lafrénière heard testimony from Pierrot, a slave belonging to Joseph Lamolère Dorville, a planter and militia captain. (While the word of a slave had no legal force against a white man, courts in all colonies used slaves' information to find culprits.) Pierrot claimed that a cow and heifer had joined his master's herd but were forcibly taken away from him by the obscure Jacques and Negro Jacob, whom Lafrénière now summoned. When neither appeared, the sheriff haunted the habitation of Philippe Periche, where the suspects were known to consort.

After the sheriff finally hauled in two of the white principals, a major presentation of accusers and accused took place before the court on March 22. According to French procedure, only after authorities had collected all the evidence from witnesses did judges formally charge the accused and confront him with the witnesses. Pierrot pointed out the perpetrators as Pierre Degoute, a thirty-five-year-old butcher (referred to in the record by his nickname, Fleury) who bought cattle from various planters. Fleury claimed that he had paid for every single head but had no proof. He insisted that he was in legitimate business with Periche, who was a glover, and Jacques had always been his honest servant—he had fled only because he was terrified by the enormity of the accusation. In all colonies, rustlers were the lowest of all criminals and could easily face the death penalty. The court reexamined everyone, typical of French procedure, in a quest for damning inconsistencies.

Still not sure who, if anyone, was guilty, the judges let another two weeks go by before pulling in Periche's carter, Joseph Trézèle, for his testimony.

He knew that Jacques sold cattle to Degoute yet had no direct knowledge of them being stolen, although Jacques had stolen money and clothing from Trézèle. The sheriff remained unable to find Jacques, who had probably fled to another parish. The sheriff finally cried Jacques's crime in public, meaning that the official toured the central plaza with a trumpeter, summoning Jacques in no uncertain terms.

On April 7, the court again grilled Degoute. During this time, he was probably being held in jail—some hot little cells just off the main square. Not satisfied with the suspect's presentation, the court decided to torture him. The judges also decided to torture Jacob, a slave belonging to Jean-Baptiste Delachaise, since they now suspected Jacob of being in collusion with the white men. Degoute's is the only recorded incident of torture of a white civilian by a court, and such torture would have been unusual even for a slave in Louisiana by 1764.[19] The form of torture is not known. The courts of Toulouse were typical in France, where they applied to men *la question ordinaire* (the *strapado*), in which the executioner threw the victim from a height with his arms anchored by ropes or pulled him up by his arms, which were tied behind his back, dislocating his shoulders, and *la question extraordinaire*, in which limb joints were dislocated by stretching the arms and legs while a large quantity of water was forced down the throat.[20] In New France, however, courts had ordered only two methods of torture: forcing large quantities of water down the throat and using the *brodequin* (boot), probably the method that the court employed in New Orleans, given that Canadians formed an important minority of the town's founders. The executioner encased the prisoner's leg in four oak boards laced tightly, and then used a mallet to drive four (in *la question ordinaire*) or eight (in *la question extraordinaire*) wedges or shims between the leg and the boards. The pain increased steadily and quickly, obtaining a confession more surely than whipping might. The procedure could not last more than ninety minutes, but the possibility of permanent damage to the leg is obvious.[21] The New Orleans authorities ordered *la question ordinaire* for both men. Jacob appears to have capitulated readily, revealing that he had helped Jacques steal a cow for a share of the meat, but Degoute resolutely denied his guilt. To give him more time to reflect in jail and to allow the sheriff to find Jacques, the court waited two weeks and then reinterrogated the accused. On April 25, the court ruled that Jacques was guilty and was to hang, although in his absence, they would hang him in effigy and seize all his property to pay court costs. Despite Lafrénière's advice to free Degoute for lack of evidence, the

court ordered him to stay in jail another six months. Long-term incarceration was unusual and may have been a severe threat to the prisoner's health. As for Jacob, he was to be flogged at the principal crossings in the town center. The judges exonerated Periche.

That was just the most spectacular of Lafrénière's many cases. As a result of the colony's prolonged crisis of legitimate authority, the zealous public prosecutor manufactured a raft of trials. Not since the era of the Natchez Uprising of 1729 were the planters so retributive toward unruly slaves and the white people who consorted with them. In addition to a big group of thirteen slaves at Cannes Brulées (on the extreme upper end of the parish) and the people in the Degoute case, Lafrénière swept up in his dragnet at least twenty other single maroons, all of whom were executed, flogged, branded, or hamstrung or had their ears notched or lopped off.[22] The law-and-order campaign included maximum pain and humiliation to set examples for the entire slave population. A slave named Caesar, guilty of petty theft but also of slightly wounding a common white man with a gun, received the judges' maximum sentence: he must do penance before the church, have his right hand chopped off, then be secured to a wheel, have his bones broken with a mallet, and be raised on a pole above Bayou Road, where he would be finished off by the sun, flies, and birds. The attorney general also required that he first be tortured by both *la question ordinaire* and *la question extraordinaire*.[23] In September 1764, Lafrénière convinced the judges to have another slave broken on the wheel, although this one enjoyed the merciful *retentum* that the executioner was to strangle him before he was broken.[24] In Louisiana, this horrible method of execution, allowed for any French person by the Criminal Code of 1670 and practiced on a white man in that country as late as 1762, was reserved for slaves and was virtually unknown for two generations prior to Lafrénière's crusade.[25]

Without new slaves arriving in flooding waves, as was the case in Virginia, New Orleans slave society was very creolized and stable, not chaotic and crime ridden. A close reading of the entire criminal record suggests that the real motivation for the vulnerable Superior Council's campaign was a desperate attempt to affirm its rule at a moment of crisis. The councillors can be seen as suffering from collective psychic trauma resulting from their rejection by the chief patriarch of their community, the French king, and their acquisition by the Crown of Spain, a monarchy they held in contempt for its autocracy and cruelty.[26] In response, they set up a bugbear of great slave disorder to incite white solidarity by rallying the forces of repression.

Thus, events in the European metropole could reverberate in the colonies down to the level of the most humble households.

New Orleans as a Slave Society

The slave society of New Orleans of 1763 can be defined by contrast to France and New France, where few slaves lived, and by comparison to other slave societies. The colonies were all sharply distinguished from France: not found in America was France's bewildering variety of courts from the *prévôtés* at the bottom to the royal courts at the top. The colonial system featured a greater simplicity and rationality, if not necessarily a greater degree of fairness. At the same time, the mother country and all its colonies had some things in common. Procedurally, the colonists abided by the ancient Customs of Paris and the royal Criminal Code of 1670. Everywhere, members of the higher class and all white persons expected and usually enjoyed privilege in courtrooms. Moreover, the Degoute case exemplifies the broader general trend in justice in the eighteenth century—a shift toward more emphasis on prosecuting crimes against property.[27] Overall, justice among all Western Europeans was more modern than in past centuries. For example, spectral evidence was no longer admissible anywhere. But legal protection of the accused remained minimal.

It is natural to examine New France and Louisiana side by side given that the two colonies were always linked by imperial policy makers. Historians of New France have strongly defended the judicial system there as relatively accessible, expeditious, cheap, and based on a prevailing principle of equity despite seigneurial privileges. The great extension of the list of felonies warranting capital punishment in eighteenth-century England had no counterpart among the French, and debtors could not be imprisoned. There was "free justice" for colonists—allowing for class differences—and the hanging tree was not busy.[28] Louisiana's full judicial record gives the impression that much the same was true there: white people of any status appeared to have access to judges and to rapid and equitable judgments. Complaints were few, and the infliction of extreme justice on white civilians was unusual.

Unlike Quebec, New Orleans was a slave society. The interracial aspect of the criminal activity in the Degoute case, with white and black men suspected as allies, worried the planters because their class was so small. To maintain racial solidarity, they would not allow white men to be partners in crime with blacks, even though the elites valued their alliance with the local

white nonslaveholders, particularly since whites had merely trickled into the colony after the initial founding wave arrived from France. With so few new recruits available on the marriage market, endogamous intermarriage had led to a spread of slaveholding by inheritance, so that nearly two out of three New Orleans white families had slaves in 1764, producing indigo and provisions for export to the West Indies and France. Only when better evidence is available from large French colonies such as Saint Domingue, where the disproportion between free people and slaves was huge, can we make safe comparative generalizations about justice in the French colonies as a group, but the racial complexity of the slave colonies made them vastly different from mostly white, seigneurial New France.[29]

At the highest level, New Orleans bears impressive similarities to the entire family of New World slave societies despite their variety. Emphasis should be placed on the converging patterns rather than on the legal details and ephemeral critical moments. All of these societies required the exercise of a certain basic and substantial degree of brute force by the minority to keep the majority enslaved and producing profits. While scholarship on judicial administration in the colonial period remains thin, it is clear that the basic four rules of slave society everywhere were that (1) every white person had the duty to support the policing of all black persons; (2) the worst crime was for any black person to raise a hand against any white person, and violators risked excruciating and humiliating punishments reserved for slaves; (3) black paternity was legally impossible; and (4) white and black must not intermarry, with any white person who violated that bar suffering everlasting degradation.[30] These rules were enforced every day by judges, constables, clergy, militia, and in French colonies, white regular soldiers.

Another way to compare is to take into account the Spanish legal system introduced in 1769. That summer, General Alejandro O'Reilly and a large number of troops arrived in New Orleans to suppress the insurrection and impose Spanish law and order, a process that included secret summary trials and executions of the rebel leaders, including Lafrénière, by firing squad.[31] The Spanish set up a much more elaborate, bureaucratized judiciary: Spanish alcaldes replaced the Superior Council. The new *cabildo*, or town government, was restricted to managing the general police of the citizenry, while military governors and licensed notaries handled most civil and serious criminal matters. Finally, the Spanish maintained a much larger garrison of soldiers (many of them Cubans) than did the French. In other words, the planters no longer exercised the muscular governmental and judicial

power they enjoyed in the French Superior Council, making the planters in effect a conquered people. Despite that change, they did very well under the autocratic Spanish system, which gave both the planters and the developing mercantile community sufficient means to organize their power. The Spanish continued the policy of restricting the most horrible judicial procedures to slaves.[32] The Spaniards imitated the post-1768 French policy in the West Indies of organizing free blacks into *maréchaussées*, militias cum police (with white officers) whose duty it was to catch runaways and to keep slaves orderly on a day-to-day basis, thereby attempting to institutionalize jealousy between the two groups of blacks.[33] The Spanish paid lip service to moderating slave owners' discipline of their slaves, but the courts mainly protected slaveholders' rights and strengthened the planters' hand so much that their rule was never seriously threatened by slaves. In contrast, planters in the mainland English colonies also controlled their slaves but usually did so without slave catchers, confident in their own capacity to police slaves without either regular soldiers or free black militia. Planters in any slave society had to hold over slaves' heads the threat of dire punishment because they could not fire or fine their chattel. When the United States purchased Louisiana in 1803, New Orleans had grown into a large town of fifteen thousand, having successfully made the leap in the 1790s from producing indigo to producing sugar despite the slave rebellion in Saint Domingue. That process required the same degree of force required to make slaves produce tobacco in Virginia or cotton in Georgia, given that slaves had nothing to lose by rebelling but their chains. Thus, Richmond, Virginia, in 1800, New Orleans in 1811, and Charleston in 1822 saw big slave conspiracies put down by militias (assisted by the U.S. Army in New Orleans) through the application of overwhelming brute force.

So racial inequity was about the same everywhere. In the spare words of Donna J. Spindel, "By modern standards, white punishment was harsh, black punishment was diabolic."[34] In all colonies, the courts were the site at which the social construction of race was accomplished by the regulation of sex and other social activities to keep whites and blacks separate.[35] And judges meted out only to slaves the most awful executions, such as burning at the stake or being broken on the wheel.[36] Ultimately, in all colonies, the white militias were prepared to take ruthless collective action, as the slaves knew very well. Still alive in New Orleans in 1763 were slaves who remembered the ferocious white backlash against black slaves who had joined

the Natchez rebels of 1729. Those long memories normally helped keep the peace in the parish.

Comparing French and English Judicial Practice

Although the legal institutions and codes of France and England were much mingled by Norman and Angevin kings, they had become very different by the eighteenth century. As the discussion of torture illustrates, the main problem for the French in both the mother country and the colonies was that of proof in criminal cases, since the system was inquisitorial rather than adversarial, like the English system. Criminal justice was meted out by a French judge according to his personal belief about the guilt of a culprit. That could mean he had no recourse other than severe browbeating and threats of torture to get at the truth. Thus, many historians regard the French judicial system, despite its comparative cheapness, as "heavily weighted in favour of those with prestige and power."[37] Nobles, for example, while occasionally subject to torture, had the right to decapitation for capital punishment rather than the more prolonged, humiliating suffering inflicted on common felons. The capacity of the ruling class to oppress the lower orders was to some degree limited by popular sentiment, and "the law maintained order by promoting equilibrium" whenever possible rather than by mere privilege and force.[38] But the king and the rest of the nobility resolutely defended their privileges and believed they must *policier* the masses by force or even terror. The white men of New Orleans emulated them—even if there were no true nobles among them—especially when the racial structure of society seemed to be at stake.[39]

In contrast to their counterparts in New Orleans, Anglo-American colonists generally adopted a judicial system very similar to that of their mother country, with all its procedural protections of criminal suspects: habeas corpus, the (still imperfect) right to a jury trial, and defensive safeguards of the accused by adversarial attorneys.[40] In practice, elites everywhere behaved the same in important ways. The eighteenth-century English elite used the parliamentary statute and courts of common law to create a fearsome judicial machine that drove the common people out of the forests, for example, and managed the bands of rootless men whose land had been enclosed by improving lords.[41] While neither of those phenomena existed in America, lawmakers in the English colonies denied accused felons the right

to counsel, and Massachusetts denied counsel to all criminal defendants.[42] That made justice cheap in New England but opened the door to moral tyranny. It meant that in crimes against property courts were dominated by those in the upper class inclined to deal out harsh judgments to the common people no less than was the case in French colonies.[43] Moreover, the constabulary was often staffed by men of questionable scruples.[44] Then, in the nineteenth century, in contrast to the English, who have always been shocked by the methods of the French police, the Americans imitated the French in entrusting greater power to police officers, who began interrogating suspects in virtual secrecy and with routine mental and physical cruelty often amounting to torture.[45]

Despite the points common among all legal systems, it is patently obvious that the accused had few rights in the French system of the Ancien Régime. People could be taken up on very slight suspicion without any apparent evidence and held indefinitely without benefit of habeas corpus, as Degoute was. The French system required criminal procedure to be carried out in secrecy to prevent culprits from being tipped off and to magnify the terror for lawbreakers. Suspects were entitled to no professionally independent legal advice to protect them against abuses. Moreover, given the lower literacy rate in French colonies, English colonists would have had a better knowledge of criminal matters because these were aired very publicly: reports of notorious cases in New England were even published for popular reading. In an English court, attorneys and witnesses dominated the trial; in a French court, the judges ruled. Although the adversarial system came into regular practice in felony trials among the English only a few generations prior to 1764, Degoute, even though white, lacked adequate constitutional procedural defenses against the judges' power.[46] The magistrate was interested in obtaining only a supposedly absolute truth rather than a truth negotiated by attorneys and juries via the procedure of English common law.

Finally, Degoute would not have been tortured in an English colony. The use of torture had been introduced to Latin, Catholic countries in medieval times after having been in abeyance since the fall of ancient Rome, which had reserved it for slave suspects. The French used torture to obtain evidence and confessions because they wanted the truth by any means necessary and because the guilty had to confess for both social and religious reasons. Torture was practiced in criminal justice until the end of the eighteenth century, although the practice became increasingly rare. If the use of these methods to obtain evidence and confessions declined among the

French after 1600, the practical value of ritual torture kept it legal until the revolution.[47]

By contrast, in England, judicial torture was barred in 1166, and even its occasional use by Tudor and Stuart monarchs led to its outright abolition, along with that of mutilation, during the English Revolution in the 1650s. (Nevertheless, James II would be the last monarch to use torture, against the Protestant rebels under Monmouth in 1685.)[48] England's statutes became more fierce over the eighteenth century and the hanging tree at Tyburn was busy, but at least that country's procedural system was governed by hard-won principles instead of royal judges driven to assert the Crown's absolute authority.[49] Moreover, the English North American colonies saw a general early trend toward the rule of fairness and the moderation of extreme measures.[50] While Degoute had no way to protect himself against arbitrary imprisonment, torture, and sanguinary executions, English courts did not subject white convicts to drawing and quartering, breaking on the wheel, or burning at the stake. It is no surprise that the Parisian rebels of 1789 first focused their anger on a prison, the Bastille, the emblem of everything unfair or cruel about criminal justice in the land of the philosophes. The English-speaking people had a jury system with lawyers that, despite its imperfections, functioned among the American colonists as a basic mechanism of self-governance and egalitarian sentiment, one they believed to be far superior to the judicial systems of the French or Spanish old regimes.[51]

An important difference also existed in the ways the planter class maintained order in British and French colonies on a day-to-day basis. In addition to the common law courts, the British had justices of the peace, who were local patriarchs responsible for performing legal acts such as marriage and acting as general agents of civil order.[52] Much of that was the domain of the clergy in New Orleans. The justices of the peace could set the constabulary in motion by issuing warrants to the sheriff. Their role in England was progressive in the sense that they tried to compose matters without calling up the state's muscle; they aimed at community consensus or morale rather than mere control by force. The justice of the peace was also the instrument by which the Protestant laity secularized major sacraments to remove them from the clergy's hands, especially marital or domestic matters. Moreover, in the colonies, the common law courts and justices of the peace provided the primary means whereby the planter class maintained racial boundaries in slave society. French and English planters thus seem to have had fundamentally different conceptions of how public order is cre-

ated: colonists in French Louisiana expected order to be imposed by Crown agents, but in British colonies, it was more often induced by persuasion, by vague ideals of consensus and equity among white people, and by popular elections of lower magistrates, all of which occurred at considerable remove from the Crown's direction. English judicial institutions implied a high degree of community autonomy and self-reliance.[53] Indeed, unlike Louisiana, the southern mainland colonies and the British West Indies had no standing garrisons of regular soldiers because the ordinary magistrates—backed up by the militia—provided the basic persuasive and coercive force to keep slaves and servile white laborers in their places and positively did not desire the presence of Redcoat garrisons.[54]

Three other factors distinguish New Orleans superficially from an English colony. First, the men of the New Orleans planter class had a different conception of themselves than their English counterparts, implying a certain weakness in their surveillance of slaves. Although mostly full-time residents, they were not becoming North Americans as eagerly as the English colonists. As one English visitor put it, the Louisianan thought of himself "as a Frenchman venturing his life, enduring a species of banishment, and undergoing great hardships for the benefit of his country," yearning to return to France.[55] In contrast, the mostly resident English planters took full responsibility for a powerful institutional array, acting as permanent settlers attentive to their patrimony in the New World. French planters dreamed of retiring to Paris or Bordeaux and therefore distrusted their ability to control a black majority when the French Crown suddenly abandoned them in 1763. A second weakness was that the French planter class included members of the clergy, who had a much more substantial establishment and were a far more numerous per capita body of religious than was true in the English colonies. That phenomenon tended to divide the planter class. All three orders in New Orleans—Capuchins, Jesuits, and Ursulines—had slave plantations, and the secular and clerical slave owners saw each other in some ways as competitors. At least some seculars must have been jealous of the growth and productivity of the clergy's plantations, given that religious property was not divisible by inheritance.[56] While many Anglo-American members of the clergy owned slaves, collectively they were not substantial slaveholders. A third peculiarity was that the planter class of New Orleans suffered a continuing fairly sharp imbalance in the distribution of the sexes, worsened by the fact that creole planter women tended to favor metropolitan gentlemen over creoles as spouses. The influx of Spanish bureaucrats and other immigrants from Spain and its populous colonies would further in-

crease the competition among creole men for women, providing a social reason why New Orleans's planters felt beleaguered and vulnerable in 1763.[57]

So when Louisiana became a territory in 1803, on the fast track to statehood in 1812, the planters heaved a sigh of relief, for metropolitan authorities no longer possessed the power to disrupt the fabric of social life in New Orleans, as the Spanish cession had done in 1763. Second, the planters recodified slave law and eliminated the Spanish privilege that enabled a few slaves to purchase freedom; otherwise, however, it was already in harmony with the laws of slavery in the other southern states and required no major overhaul. A third effect of the Louisiana Purchase was that given the autocratic power of French and Spanish magistrates, it is no wonder that the locals welcomed reform of the criminal law for whites when the Americans took over the colony. The planters objected vociferously to the introduction of the English common law in civil matters, and the Jefferson administration backed down on that account. But the planters welcomed criminal law—with juries, an adversarial attorney system, and habeas corpus and without secret testimony and torture.[58] Allowing for some minor cultural stumbling blocks, Louisiana rather easily slid into its place in the fabric of the Old South.

NOTES

1. For more detail, see Thomas N. Ingersoll, *Mammon and Manon in Early New Orleans: The First Slave Society in the Deep South, 1718–1819* (Knoxville: University of Tennessee Press, 1999), 27–33, 95–96, 134–44. For a similar, smaller slave society in the interior, see H. Sophie Burton and F. Todd Smith, *Colonial Natchitoches: A Creole Community on the Louisiana-Texas Frontier* (College Station: Texas A & M University Press, 2008). For other approaches to French New Orleans, see Jennifer M. Spear, *Race, Sex, and Social Order in Early New Orleans* (Baltimore: Johns Hopkins University Press, 2009); Gwendolyn Midlo Hall, *Africans in Colonial Louisiana: The Development of Afro-Creole Culture in the Eighteenth Century* (Baton Rouge: Louisiana State University Press, 1992), 119–55; Shannon Lee Dawdy, *Building the Devil's Empire: French Colonial New Orleans* (Chicago: University of Chicago Press, 2008).

2. For a critical evaluation, see Jerry A. Micelle, "From Law Court to Local Government: Metamorphosis of the Superior Council of French Louisiana," *Louisiana History* 9, no. 2 (1968): 85–107. For the original edict of September 12, 1719, see Henry P. Dart, "The Legal Institutions of Louisiana," *Louisiana Historical Quarterly* [hereafter *LHQ*] 2, no. 1 (1919): 86–90. On the council as the seat of the "aristocracy" in the French colonies, see Paul Butel, *Histoire des Antilles Françaises, XVIIe–XXe Siècles* (Paris: Perrin, 2002), 132–36.

3. John A. Dickinson, *Justice et Justiciables: La Procédure Civile à la Prévoté de Québéc, 1667–1759* (Quebec: Presses de l'Université Laval, 1982), 5–7.

4. On French criminal procedure, see Richard M. Andrews, *Law, Magistracy, and Crime in Old Regime Paris, 1735–1789*, vol. 1, *The System of Criminal Justice* (New York:

Cambridge University Press, 1994), 417–504; Roland Mousnier, *The Institutions of France under the Absolute Monarchy, 1598–1789: Society and the State*, vol. 2, *The Organs of State and Society*, trans. Arthur Goldhammer (Chicago: University of Chicago Press, 1984), 388–408; Julius R. Ruff, *Crime, Justice, and Public Order in Old Regime France: The Sénéchaussées of Libourne and Bazas, 1696–1789* (Dover, N.H.: Croom Helm, 1984); Christiane Plessix-Buisset, *Le Criminel devant ses Juges en Bretagne aux 16e et 17e Siècles* (Paris: Maloine, 1988). On New France, see John A. Dickinson, "New France: Law, Courts, and the Coutume de Paris, 1608–1760," in *Canada's Legal Inheritances*, ed. DeLloyd J. Guth and W. Wesley Pue (Winnipeg: University of Manitoba Faculty of Law, 2001), 32–54; André Lachance, *La Justice Criminelle du Roi au Canada au XVIIIe Siècles* (Quebec: Presses de l'Université Laval, 1978); Peter N. Moogk, *La Nouvelle France: The Making of French Canada, a Cultural History* (East Lansing: Michigan State University Press, 2000), 53–86; Jim Phillips, "Crime and Punishment in the Dominion of the North: Canada from New France to the Present," in *Crime History and Histories of Crime: Studies in the Historiography of Crime and Criminal Justice in Modern History*, ed. Clive Emsley and Louis A. Knafla (Westport, Conn.: Greenwood, 1996), 163–200. See also Otto Kahn-Freund, Claudine Lévy, and Bernard Rudden, *A Source-Book on French Law, Public Law, Constitutional and Administrative Law, and Private Law: Structure, Contract*, 3rd ed. (Oxford: Clarendon, 1991).

5. Marc de Villiers du Terrage, *The Last Years of French Louisiana*, trans. Hosea Phillips, ed. Carl A. Brasseaux (Lafayette: University of Southwestern Louisiana Press, 1982), 184. Lafrénière sought to have all long-term runaway slaves hamstrung, but the councillors refused to let Lafrénière excite them unduly about what was clearly a rather low level of parochial disorder. See *State v. Fribustier*, October 18–November 3, 1764, *State v. François*, March 1–2, 1765, Louisiana Historical Collection (LHC), Louisiana State Museum, Louisiana Historical Center, Old Mint, New Orleans.

6. Villiers du Terrage, *Last Years*, 138–40.

7. *A Comparative View of French Louisiana, 1699 and 1762: The Journals of Pierre Le Moyne d'Iberville and Jean-Jacques-Blaise d'Abbadie*, trans. and ed. Carl A. Brasseaux, 2nd ed. (Lafayette: University of Southwestern Louisiana Press, 1981), 119–20.

8. Ibid., 90–95. The soldiers may not have been good for much in case of real war, given the governor's bitter complaints about them. See Kerlérec to Peirène de Moras, October 20, 1757, Archives Nationales (AN), Archives des Colonies (AC), Paris, C13, 39:268–71; Kerlérec to Berryer, December 21, 1760, AN, AC, C13a, 42:83–85.

9. Marion F. Godfroy-Tayart de Borms, "La Guerre de Sept Ans et Ses Conséquences Atlantiques: Kourou ou l'Apparition d'un Nouveau Système Colonial," *French Historical Studies* 32, no. 2 (2009): 167–91; Jacques Michel, *La Guyane sous l'Ancien Régime: Le Désastre de Kourou et ses Scandaleuses Suites Judiciaires* (Paris: Harmattan 1989), 89–91. See also Serge Mam-Lam-Fouck, *La Guyane Française de la Colonisation à la Départementalisation: La Formation de la Société Créole Guyanais* (Paris: Désormeaux, 1982); Robert Larin, *Canadiens en Guyane, 1754–1805* (Paris: Septentrion, 2006).

10. For a recent appraisal of the substantial importance of the clergy in the French colonies, especially the Jesuits, see Marie Polderman, *La Guyane Française, 1686–1763: Mise en Place et Évolution de la Société Coloniale, Tensions et Métissages* (Petit-Bourg, Guadeloupe: Ibis Rouge, 2004), 210–63.

11. Villiers du Terrage, *Last Years*, 151–56. The colonists were astounded that Louis XV had made good on his debts to other colonies after the war but singled out Louisiana for neglect. See Merchants' Petition, July 10, 1765, AN, AC, C13a, 45:66–68.

12. Walter E. Roth, ed., "The Story of the Slave Rebellion in Berbice, 1762," trans. of J. J. Hartsinck, *Beschryving van Guiana* (Amsterdam, 1770), *Journal of the British Guiana Museum and Zoo*, nos. 21–27 (December 1958–September 1960). On the lasting memory of this rebellion, see Emilia Viotti da Costa, *Crowns of Glory, Tears of Blood: The Demerara Slave Rebellion of 1823* (New York: Oxford University Press, 1994), 80, 193–94.

13. *Relation d'Une Conspiration Tramée par les Negres dans l'Isle de S. Domingue, Défense Que Fait le Jésuite Confesseur, aux Negres qu'on Suplicie, de Révéler Leurs Fauteurs & Complices* (N.p., n.d., copy in the Bibliothèque Nationale); Villiers du Terrage, *Last Years*, 183–84. On Crown policy, see Léo Elisabeth, *La Société Martiniquaise aux XVIIe et XVIIIe Siècles, 1664–1789* (Paris: Karthala, 2003), 345–87.

14. D'Abbadie to Choiseul, September 30, 1764, AN, AC, C13a, 44:124–24v.

15. Charles E. O'Neill, "The Louisiana Manifesto of 1768," *Political Science Reviewer* 19, no. 1 (1990): 247–89; Richard E. Chandler, ed., "Ulloa's Account of the 1768 Revolt," *Louisiana History* 27, no. 4 (1986): 407–37; John P. Moore, *Revolt in Louisiana: The Spanish Occupation, 1766–1770* (Baton Rouge: Louisiana State University Press, 1976).

16. If there was a local *prévôté* for minor matters, its records are lost, and notarial records before 1769 are scarce. See Henry P. Dart, "Criminal Trials, Louisiana, 1720–1766: The French Period," *LHQ* 3, no. 3 (1920): 179–80; Henry P. Dart, "A Criminal Trial before the Superior Council of Louisiana, May, 1747," *LHQ* 13, no. 1 (1930): 367–76.

17. On the new attorney general, see Kerlérec to Brochard, May 6, 1759, AN, AC, C13a, 41:54–54v. His program to cow slaves began his road to martyrdom, for he led the 1768 insurrection against Carlos III.

18. Ordinarily, only a slave would be identified solely by a personal name in the judicial record, but the racial status of blacks (*négre* or *mulatre*) was always given, and Jacques is not so identified in the record, so he was white. Since neither Degoute nor Periche appears in the New Orleans Parish Sacramental Records of the Roman Catholic Church, it is possible that both men were Flemings who found their way to Louisiana in the army and retired there.

19. For somewhat conflicting statistics concerning about nineteen total incidents of torture in the courts of New France, see Lachance, *Justice Criminelle*, 79–85; W. J. Eccles, *Canadian Society during the French Regime* (Montreal: Harvest House, 1969), 41–42.

20. On punishments in general, see Andrews, *Law, Magistracy, and Crime*, 283–408; Marguerite Rateau, "Les Peines Capitales et Corporelles en France sous l'Ancien Régime, 1670–1789," *Annales Internationales de Criminologie* (1963): 276–308. See also Lisa Silverman, *Tortured Subjects: Pain, Truth, and the Body in Early Modern France* (Chicago: University of Chicago Press, 2001), 96–99; Edward Peters, *Torture*, 2nd ed. (Philadelphia: University of Pennsylvania Press, 1985), 67–69.

21. Lachance, *Justice Criminelle*, 80–83.

22. The executioner broke two on the wheel; hanged two; flogged, branded, and hamstrung two; flogged and branded five; and cut off both ears and branded a cheek or shoulder of seven. The court sold one away from her lover, and the fate of one is unknown. See Ingersoll, *Mammon and Manon*, 91.

23. *State v. Caesar*, June 20–July 24, 1764, LHC, ruling of July 21.

24. *State v. Louis*, September 3–10, 1764, LHC, ruling of September 10.

25. Only one white man is known to have been broken on the wheel for a crime in New Orleans, a Frenchman who completed a series of murders across the globe by killing a man on Bourbon Street one night in 1767 over a billiard ball. See *State v. Jacques Toussaint Baude*, November 6–12, 1767, LHC. Even he was mercifully strangled one hour

after being broken; see judgment of November 12. Another white man who killed somebody in a loutish quarrel in Natchitoches in 1765 (a man named Degout but apparently a different man) was also mercifully strangled before being broken on the wheel. See *State v. Michel Degout*, October 31, 1765–February 1, 1766, LHC. For a useful translation of this entire case, see "Michel Degout, Charged with Murder," trans. Heloise H. Cruzat, ed. Henry P. Dart, *LHQ* 3, no. 3 (1920): 294–321; see especially 309–10 for the uniquely recorded specifics of the elaborate ritual of an *amende honorable* and execution. The convicted presumably did not know of a merciful *retentum* until the executioner exercised it. In the 1762 French case, made infamous by Voltaire, the court of Toulouse had Jean Calas broken on the wheel, strangled, and burned in a public square during an anti-Protestant panic. See Silverman, *Tortured Subjects*, 157–60; see 153–76 on the philosophes' campaign against torture because they "rejected the notion that pain had truth value" (168).

26. On the concept that trauma may have disturbed the perceptual and cognitive capacities of the planters, which conditioned them to lash out at what they perceived to be the most subversive elements in their society, see Barry M. Shapiro, *Traumatic Politics: The Deputies and the King in the Early French Revolution* (University Park: Pennsylvania State University Press, 2009).

27. Benoît Garnot, *Crime et Justice aux XVIIe et XVIIIe Siècles* (Paris: Imago, 2000), 11–58. Garnot refutes the argument that the treatment of criminals was the focal point of a fundamentally new discursive elaboration that went into higher gear after 1800, as Michel Foucault argues in *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage, 1979).

28. Dickinson, *Justice et Justiciables*, 97–98; see also 59–76 on procedure and 77–98 on costs and duration. See also Eccles, *Canadian Society*, 39–41. Dart generally approves of Louisiana's judicial system, emphasizing the absence of burdensome expenses for citizens. See Henry P. Dart, *Courts and Law in Colonial Louisiana* (New Orleans: Montgomery-Andree, 1921), 17; see also 46–47 for his praise of the Spanish system installed in 1769 for its lack of corruption. For a comparative view of another small French slave society in the New World, see Polderman, *Guyane Française*, 143–52.

29. For some recent scholarship, see Laurent Dubois and Julius S. Scott, eds., *Origins of the Black Atlantic* (New York: Routledge, 2010); John D. Garrigus, *Before Haiti: Race and Citizenship in French Saint-Domingue* (New York: Palgrave Macmillan, 2006); François Blancpain, *La Colonie Française de Saint-Domingue: De l'Esclavage à l'Indépendance* (Paris: Karthala, 2004); Butel, *Histoire des Antilles Françaises*, 91–208.

30. For a nuanced discussion of similarities and differences of slave law across the Americas, see Sally E. Hadden, "The Fragmented Laws of Slavery in the Colonial and Revolutionary Eras," in *The Cambridge History of Law in America*, vol. 1, *Early America, 1580–1815*, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 1:253–87.

31. David K. Bjork, ed., "Alexander O'Reilly and the Spanish Occupation of Louisiana, 1769–1770," in *New Spain and the Anglo-American West: Historical Contributions Presented to Herbert Eugene Bolton* (New York: Kraus Reprints, 1969), 1:165–82; David K. Texada, *Alejandro O'Reilly and the New Orleans Rebels* (Lafayette: University of Southwestern Louisiana Press, 1970).

32. The Spanish occasionally tortured slaves accused of serious crimes. See *State v. Temba and Mirliton*, June 1, 1771, LHC, for the case of the spectacular murder of planter Jean-Baptiste Cezaire Lebreton.

33. Bernard Gainot, *Les Officiers de Couleur dans les Armées de la République et de l'Empire, 1792–1815: De l'Esclavage à la Condition Militaire dans les Antilles Françaises* (Paris: Karthala, 2007), 13–15. See also Roland C. McConnell, *Negro Troops of Antebellum Louisiana: A History of the Battalion of Free Men of Color* (Baton Rouge: Louisiana State University Press, 1968); Kimberly S. Hanger, "A Privilege and Honor to Serve: The Free Black Militia of Spanish New Orleans," *Military History of the Southwest* 21, no. 1 (1991): 59–86.

34. Donna J. Spindel, *Crime and Society in North Carolina, 1663–1776* (Baton Rouge: Louisiana State University Press, 1989), 137.

35. Kathleen M. Brown, *Good Wives, Nasty Wenches, and Anxious Patriarchs: Gender, Race, and Power in Colonial Virginia* (Chapel Hill: University of North Carolina Press, 1996), 187–211.

36. Philip J. Schwarz, *Twice Condemned: Slaves and the Criminal Laws of Virginia, 1705–1865* (Baton Rouge: Louisiana State University Press, 1988), 82.

37. Stuart Carroll, *Blood and Violence in Early Modern France* (New York: Oxford University Press, 2006), 213; see also 185–213.

38. Ibid., 214; see also 214–33.

39. The French system muddled along until the Revolution of 1789. See Benoît Garnot, *Questions de Justice, 1667–1789* (Paris: Belin, 2006), 141; see also 139–43.

40. John H. Langbein, Renée Lettow Lerner, and Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (New York: Wolters Kluwer, 2009), 330–35, 589–612, 689–705; on the atrophy of the criminal jury trial, see 705–13. See also Schwarz, *Twice Condemned*.

41. E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon, 1975); Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson, and Cal Winslow, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Pantheon, 1975).

42. Langbein, Lerner, and Smith, *History of the Common Law*, 737.

43. Spindel, *Crime and Society*, 102.

44. Langbein, Lerner, and Smith, *History of the Common Law*, 733–34.

45. Iain A. Cameron, *Crime and Repression in the Auvergne and the Guyenne, 1720–1790* (Cambridge: Cambridge University Press, 1981), 1–2, 83–88, 101–15; Langbein, Lerner, and Smith, *History of the Common Law*, 749–50.

46. Langbein, Lerner, and Smith, *History of the Common Law*, 689–700.

47. Peters, *Torture*, 73; Carroll, *Blood and Violence*, 198–99. On the reforms in the law of proof required to end torture in Roman law countries, see John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (Chicago: University of Chicago Press, 1977), 3–32.

48. Peters, *Torture*, 54–62. On England, see Langbein, *Torture*, 73–77.

49. Randall McGowen, "'Making Examples' and the Crisis of Punishment in Mid-Eighteenth Century England," in *The British and Their Laws in the Eighteenth Century*, ed. David Lemmings (Rochester, N.Y.: Boydell, 2005), 182–205; Pieter Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression: From the Preindustrial Metropolis to the European Experience* (New York: Cambridge University Press, 1984), 150–53; see also 110–82.

50. Bradley Chapin, *Criminal Justice in Colonial America, 1606–1660* (Athens: University of Georgia Press, 1983), 62–63.

51. Langbein, Lerner, and Smith, *History of the Common Law*, 415–556. After the conquest of New France in 1760, the French colonists were not initially eager to accept the jury system because the upper class regarded jury service as "humiliating and degrading" and the common people saw it as burdensome, but French colonists eventually accepted juries in criminal trials. See Testimony of William Hey, Chief Justice of Quebec, Concerning the Québécois, June 3, 1774, in *Debates of the House of Commons in the Year 1774 on the Bill for Making More Effectual Provision for the Government of the Province of Quebec, Drawn Up from Notes of Sir Henry Cavendish, Bart.*, ed. J. Wright (London: Ridgway, 1839), 151. The same would later be true of the Louisianans. On the problematic introduction of the jury system in France in 1791, see James M. Donovan, *Juries and the Transformation of Criminal Justice in France in the Nineteenth and Twentieth Centuries* (Chapel Hill: University of North Carolina Press, 2010), 21–48.

52. Norma Landau, *The Justices of the Peace, 1679–1760* (Berkeley: University of California Press, 1984). On the courts, see Rhys Isaac, *The Transformation of Virginia, 1740–1790* (Chapel Hill: University of North Carolina Press, 1982), 88–94.

53. On local control in the English colonies, see Richard J. Ross, "Legal Communications and Imperial Governance: British North America and Spanish America Compared," in *Cambridge History*, ed. Grossberg and Tomlins, 1:104–43. For the larger context, see Michael Meranze, "Penality and the Colonial Project: Crime, Punishment, and the Regulation of Morals in Early America," in *Cambridge History*, ed. Grossberg and Tomlins, 1:178–210.

54. See David Thomas Konig, "Regionalism in Early American Law," in *Cambridge History*, ed. Grossberg and Tomlins, 1:154–55; James A. Henretta, "Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America," in *Cambridge History*, ed. Grossberg and Tomlins, 1:556–61.

55. Philip Pittman, *The Present State of the European Settlements on the Mississippi*, ed. Robert R. Rea (1770; Gainesville: University Press of Florida, 1973), 13. For a military description of New Orleans, see [William Perry], "New Orleans in 1758," ed. Henry P. Dart, *LHQ* 4, no. 1 (1922): 56.

56. Gabriel Debien, *Les Esclaves aux Antilles Françaises, XVIIe–XVIIIe Siècles* (Basse-Terre, Guadeloupe, and Fort de France, Martinique: Société d'Histoire, 1974), 249–95; Antoine Gisler, *L'Esclavage aux Antilles Françaises, XVIIe–XIXe Siècle: Contribution au Problème de l'Esclavage* (Paris: Karthala, 1981), 151–208.

57. Arlette Gautier, *Les Soeurs de Solitude: La Condition Féminine dans l'Esclavage aux Antilles du XVIIe au XIXe Siècle* (Paris: Éditions Caribéennes, 1985), 31–36.

58. Report by William C. C. Claiborne, August 24, 1803, in *The Territorial Papers of the United States*, vol. 9, *The Territory of Orleans, 1803–1812*, ed. Clarence E. Carter (Washington, D.C.: U.S. Government Printing Office, 1940), 21. See also Report by Daniel Clark Jr., September 8, 1803, in *Territorial Papers*, ed. Carter, 9:36–37, on the lack of attorneys in Louisiana before the Americans arrived.

"Using the Faculties Conceded to Her by Law"

Slavery, Law, and Agency in Spanish New Orleans, 1763–1803

Jennifer M. Spear

IN SEPTEMBER 1773, Catherina, a thirty-six-year-old slave of the estate of Jean Baptiste Destrehan, petitioned the estate's executors for freedom for herself and her five-year-old daughter, Felicité. Gabriel Fazende, one of the estate's two executors, quickly consented, but the second executor, Estevan Boré, who was married to one of Destrehan's daughters, refused. Asking the court to dismiss Catherina's petition, Boré declared that "in no manner will he consent to giving her her freedom considering her bad conduct, her iniquity, [and] her dissimulation." Two days later, Catherina filed a response. She proclaimed that she had "merited the right to buy her freedom" as she had "been a slave of this estate all of her life" and had "served with fidelity." Governor Luis Unzaga, after consulting with his legal adviser, ordered Boré to determine Catherina's price, threatening that if he failed to do so, Unzaga would allow Catherina to purchase herself at the price at which she was listed in the estate inventory. Boré protested one more time, accusing Catherina of "very great libertinism" and of lying about her faithful service. Although he had lost the battle to deny Catherina her freedom, Boré continued to contest how much that freedom would cost her and her daughter. After a few days of negotiation, an external appraiser valued them at 320 pesos, far less than the 600 pesos on which Boré had insisted. In early November, just three months after she filed her first petition, a reluctant Boré issued Catherina her *carta de libertad*, or freedom letter, as notarized acts of manumission were known.[1]

Catherina's suit was initiated by a slave, assisted by unnamed third parties who had given her money to purchase her freedom, and enabled by colonial officials who, if not sympathetic to her plight, were at least willing to grant her what they deemed to be a fair hearing rooted in the rights they

believed Spanish law provided to enslaved peoples. Ever since Frank Tannenbaum published *Slave and Citizen* in 1946, historians have argued about the impact of law on the experience of enslavement in the Americas.[2] For Tannenbaum, Spanish slave law (in conjunction with Catholicism) significantly ameliorated the condition of enslaved persons, especially in contrast to those owned by English-descended Protestants who, Tannenbaum argued, had no legal tradition of slavery on which to draw, thus allowing colonial slave owners much more leeway over the development of slave law. Critics have argued that Tannenbaum exaggerated the reach of metropolitan legal and religious principles and failed to recognize English legal precedents that shaped the development of Anglo-American slave law. Many scholars have denied that law mattered at all, arguing that demographics, economics, local customs, and labor regimes were far more influential in shaping the slave experience.[3]

Colonial New Orleans is indeed the perfect site for revisiting the Tannenbaum thesis.[4] Not only did each successive colonial regime introduce its own laws of slavery, allowing us to analyze whether those legal changes had an impact on the experience of enslavement, but slavery underwent a dramatic demographic and economic expansion during the Spanish era, allowing us to see whether the Spanish legal regime could resist the growth and entrenchment of plantation slavery or whether its impact was confined to what Philip D. Morgan has called "frontier slave societies."[5] This essay revisits Tannenbaum and argues that for Spanish New Orleans at least, the law did matter. Based principally on legal records from eighteenth-century Louisiana, this essay argues that the law's significance was realized only through the combined actions of three groups of actors: judicial officials, sympathetic nonslaves who provided funds and advice, and most important, the enslaved themselves. While Spanish law did not mediate the actual day-to-day treatment of slaves by their owners, it provided them with greater options for freedom than had existed under the previous French regime (and contemporary Anglo-American ones), and they quickly learned to take advantage of these opportunities. Between 1769 and 1803, 124 slaves filed freedom suits, most of them under the principle of *coartación* (the right to self-purchase), while a small number claimed that their enslavement was illegal under the ban on indigenous slavery. And it is these enslaved petitioners who demand our attention. Spanish judges proved willing to defend slaves' right to freedom but did not do so until slaves claimed those rights for themselves.

Spanish-era slave laws were principally written by a distant metropole with little knowledge of the local conditions and day-to-day operations of slavery in Louisiana. Although these laws contained some provisions to ameliorate slavery, the local officials responsible for enforcing them generally ignored these provisions, and therefore, they did little to lessen the brutality of the slave experience. More important were the mechanisms for manumission that slaves learned to manipulate, greatly expanding their access to freedom. While some bureaucrats and slave owners facilitated the process of manumission, far more important was the agency of the enslaved people, who desired freedom and as quick students of the law readily exploited disagreements among officials and elites to act on those desires. Calling on judicial officials who demonstrated their willingness to defend aspirations for freedom, slaves pressured owners for unconditional freedom or for uncontested *coartaciónes*. Through the intersection of law and slave initiative—what historian Alejandro de la Fuente calls "claims-making"[6]—people of African ancestry redeemed themselves from slavery.

During Louisiana's French era (1699–1769), manumission was possible but was highly restricted by the requirement that owners receive permission from the local governing body.[7] This judicial constraint and a demand for slaves that far surpassed supply discouraged manumission in the French colony, as just over 60 slave owners declared their intentions to free fewer than 150 slaves during the French era, which ended with an enslaved population of almost 3,500 in the greater New Orleans region.[8] Unfortunately, the state of the extant records makes it impossible to determine the exact number who were actually manumitted. Of the 146 slaves who are mentioned in connection with manumission, 55 definitely received their freedom, another 18 probably did, and 8 probably did not; the status of the remaining 65 is unclear.[9]

When Governor Alejandro O'Reilly established Spanish authority in 1769, Spanish law and legal practices quickly followed suit. Although O'Reilly issued no decree specifically on manumission and indeed stated that the 1724 Code Noir remained the law of the land insofar as it did not contravene Spanish law, as early as 1771, New Orleans's notaries were recording manumissions without reference to government permission, as had been required by French law. Owners began freeing their slaves without having to choose from a limited range of legitimate reasons or defending their actions before a government or judicial official. All they had to do was declare their slave free at the baptismal font, in their wills, or before a notary.

Even more significant than abolishing French-era constraints on manumission, however, was the introduction of *coartación*, which allowed slaves to be freed at their own initiative, even without their owners' consent. Developed by owners and slaves in Cuba, *coartación* acknowledged slaves' rights to personal property (to acquire the funds with which to purchase their freedom) and to act as legal agents capable of making contracts, at least when their own freedom was at issue. *Coartación* also recognized owners' right to compensation for the loss of their property. The idea received royal recognition and legal sanction in the late 1760s, just as the Spanish arrived in Louisiana, when the Crown decreed that "when the slaves deliver to their owners the amount of their value, acquired permissibly by honest means, whether from their own industry or from relations or friends . . . , in order to be redeemed from captivity or servitude, the said owners are obligated to grant them, simply and legally, a *carta de libertad*."[10]

The implications of these differences between French and Spanish manumission policies were very quickly realized. In just four years, more slaves gained their freedom than during the entire five previous decades. Eventually, more than two thousand slaves were manumitted in New Orleans before Spanish rule effectively ended in 1803. One hundred nineteen were promised freedom after completing additional service or fulfilling other conditions, while 124 won their freedom through litigation. The vast majority received it either *graciosa* (unconditionally and without their owners receiving any form of compensation) or through *coartación* (see figure 3). Although the numbers overall were roughly split between these two principal forms of manumission, the ratio between the two changed dramatically over the four-decade era. During the 1770s, as New Orleanians adjusted to living under Spanish rule, half of all manumissions were granted unconditionally, while only a third were obtained through purchase. The two forms achieved near parity in the 1780s before the number of *coartacións* surpassed *graciosa* manumissions in the 1790s. During the last few years of Spanish New Orleans, nearly 60 percent of manumissions involved purchase, while unconditional freedom accounted for just over a third of the total (see figure 4).

As figure 4 also illustrates, the number of manumissions increased significantly from decade to decade. At the beginning of the Spanish era, an average of 40 slaves found their way to legal freedom each year; by 1803, this number had more than doubled. At the same time, however, the enslaved population of the greater New Orleans region almost tripled, topping 9,000.[11] Whereas about 1 slave out of every 125 had a chance for freedom in

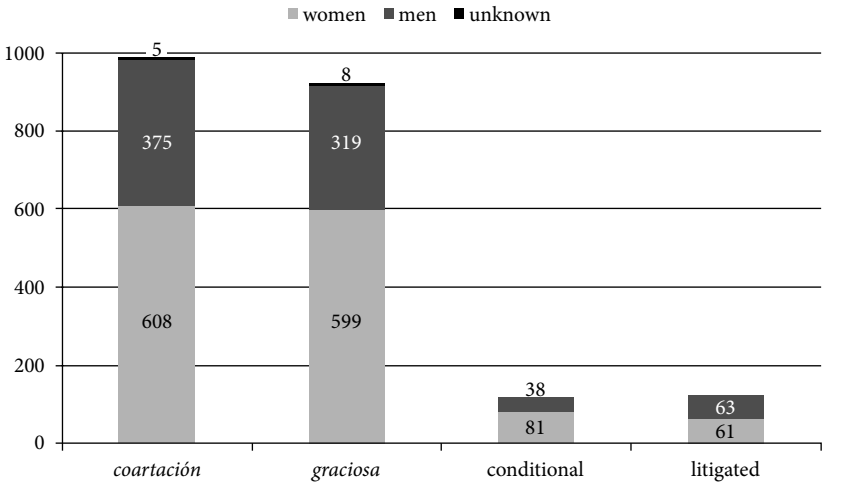


FIGURE 3. Spanish-Era Manumissions by Type and Gender. Based on "Louisiana Free Database, 1719–1820," in *Databases for the Study of Afro-Louisiana History and Genealogy, 1699–1860: Computerized Information from Original Manuscript Sources*, ed. Gwendolyn Midlo Hall (Baton Rouge: Louisiana State University Press, 2000). About half of the *coartacións* were paid by a third party; the remainder were at least recorded as self-purchases. Of the litigated cases, 114 involved the principle of *coartación*.

the early 1770s, by the end of the Spanish era, only one in almost 300 did. Although this was a significant decline, slaves in New Orleans still had a much greater chance to obtain their freedom than, for example, those in postrevolutionary Virginia or early nineteenth-century Antigua.[12]

A slave's chances of obtaining freedom were shaped by the ups and downs of the slave trade. Slave owners and would-be slave owners in Louisiana had had virtually no access to the transatlantic slave trade since the early 1730s as they struggled to develop a profitable export crop that would give them the credit to participate in a market that privileged Saint-Domingue. Bowing to local pressure, the Spanish Crown reopened the slave trade in 1777, permitting Louisianans to purchase slaves from the French Caribbean. Five years later, the trade expanded further as inhabitants were permitted to import slaves, duty free, from neutral or friendly countries. In 1786, however, the trade was curtailed once again as a ban on imports from the French or British Caribbean was implemented, followed by a total ban between 1795 and 1800.[13] The increased availability of slaves certainly encouraged some owners to reward an individual slave or two with freedom, knowing that they could easily be replaced. But the relationship between the expansion

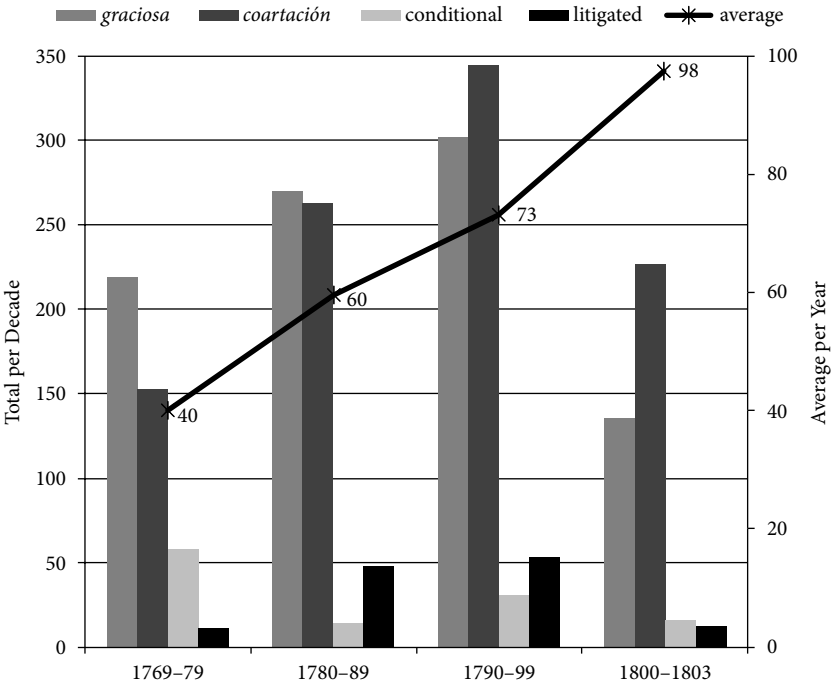


FIGURE 4. Spanish-Era Manumissions by Decade and Type. Based on "Louisiana Free Database, 1719–1820," in *Databases for the Study of Afro-Louisiana History and Genealogy, 1699–1860: Computerized Information from Original Manuscript Sources*, ed. Gwendolyn Midlo Hall (Baton Rouge: Louisiana State University Press, 2000).

of the slave trade and manumissions was not a simple one, as owners began manumitting their slaves in dramatically higher numbers before the trade reopened in 1777 and the number of manumissions increased in the years following the 1795 ban (see figure 5).[14] At least some owners, then, were responding not to market forces but rather to the legal changes introduced by Spanish rule, suggesting that more slaves would have been freed during the French era if manumission policies had not been so restrictive.

Owners were not the only ones to respond to the changing legal regime. The first slave to successfully request his *carta* was an elderly *negro*, Bautista, who paid Joseph Meunier a meager thirty pesos for his freedom in March 1771.[15] Over the next four decades, such voluntary arrangements were emulated by nearly one thousand slaves or third parties acting on their behalf and owners. Only when slaves and their owners could not agree on a price or when the owner refused to negotiate at all did slaves turn to the courts. Although fewer than 10 percent of all manumissions acquired through purchase

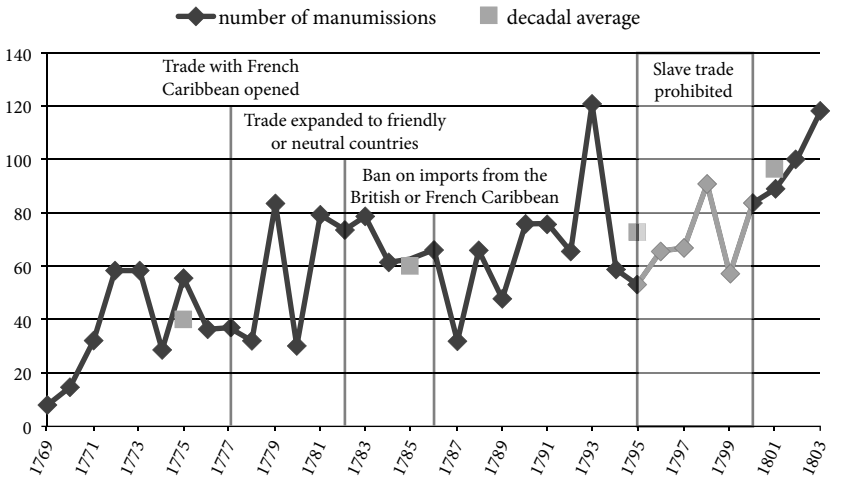


FIGURE 5. Manumissions and the Slave Trade. Based on "Louisiana Free Database, 1719–1820," in *Databases for the Study of Afro-Louisiana History and Genealogy, 1699–1860: Computerized Information from Original Manuscript Sources*, ed. Gwendolyn Midlo Hall (Baton Rouge: Louisiana State University Press, 2000).

required judicial intervention, slaves' ability to call on the court—and the court's willingness to rule in their favor—caused more owners to negotiate voluntarily.[16]

A few months later, *mulata* Juana Catalina initiated the first litigated case of *coartación* when she petitioned the governor, "requesting the favor that the laws concede to her for her *rescate* [ransom or redemption]." She pointed out that she had "made special services to [her deceased owners] during their lives" and requested an appraisal to set her freedom price. Valued as a group with her husband and son at nine hundred pesos in the inventory of the Destrehan estate, she was appraised alone at three hundred pesos. Within three weeks, Juana Catalina paid the sum and received her *carta*.[17] When slaves petitioned the courts, they generally claimed that doing so was their last resort. Petitioner Michel had asked his owner many times "to grant him his liberty for a just price," but since she had "never been willing to draw up an Act of Emancipation," he appealed to the court to authorize an appraisal.[18] Once the process was initiated, a slave and his or her owner each appointed an appraiser. If the two assessments differed, the court would appoint a third, whose valuation was usually final. Upon receipt of full payment (whether in a lump sum, installment payments, or from a third party), the owner was forced to appear before a notary to issue a notarial act de-

claring that the slave was free, regardless of whether the owner had initially consented to the process.[19]

Slaves and their free relatives did their best to influence appraisers into determining the lowest possible freedom price. In 1784, *negro libre* Valentin petitioned the court to free his brother, Silvestre, for three hundred pesos, the price quoted in a recent inventory of his owner's estate. The estate's executor, Francisco Marie de Reggio, agreed to the purchase but not at the inventoried price, arguing that "a new estimate will have to be made . . . because an appraisement made in an inventory is nothing more than a legal formality, taken so as not to cause confusion at the auction sale." Valentin had no objection to a new appraisal but requested that his brother first be examined by a doctor, who might determine "whether [Silvestre] suffers from any infirmity and [could testify to] the exact state of his health." A few weeks later, two doctors reported that Silvestre had a dislocated knee that made it difficult for him to practice his trade, although they considered him only "slight injured" and not "totally crippled." After listening to three appraisers, who consulted the doctors' testimonies and discussed "Silvestre's talents and the infirmity from which he actually suffers," the court ultimately determined that Silvestre's true value was eight hundred pesos, an amount Valentin promptly produced.[20] Similarly, Catherina frequently referenced her infirmities in the battle over her *coartación* price with Estevan Boré. She claimed to be "usually sick from a certain accident which has injured her" and requested an appraiser who knew "the state of her health and . . . of her habitual infirmities." She also argued that "it will be of greater interest to the estate to sell her to herself for cash, invest the money in a young *negro* boy, capable of working and earning for it, than to continue to hold her in bondage when her health will no longer permit her to work."[21]

Negra libre Elena went so far as to denigrate her son, Maylois, during the appraisal process in an effort to lower his purchase price in a case that also revealed her astute knowledge of the *coartación* process. In 1780, she requested an appraisal, noting that the boy's father, *negro libre* Jasson, had sent her the money necessary to free Maylois. Pedro Piernas, the *alcalde* (local magistrate) who oversaw this case, ordered Maylois's owner to appoint an appraiser, warning that if he failed to do so, the court would name one on his behalf. When Elena's appraiser valued the slave at six hundred pesos while the owner's appraiser valued him at eight hundred pesos, the *alcalde* named a third. The court-appointed appraiser also valued Maylois at six hundred pesos, making this one of the few cases in which the slave's rather

than the owner's assessment was confirmed. At first, Piernas granted Elena's right to free her son at six hundred pesos, but he then overruled himself and ordered a fourth appraisal, which returned a valuation of eight hundred pesos. Elena then asserted her right to review the court records, after which she submitted a petition that pursued two lines of argumentation.

On the one hand, Elena denied that her son had the "talents and abilities" that his owner claimed for him, declaring that "he is a thief and a drunkard" who "knows no trade" and had even been arrested. She went on to compare his valuation with the *coartacións* of "an expert blacksmith" and a "master carpenter," among other skilled craftsmen, who had been freed for eight hundred pesos and begged the "court to consider six hundred pesos as sufficient for her poor miserable son." On the other hand, she demonstrated an understanding of proper judicial procedure in arguing that the fourth appraisal should be "revoked as it is contrary to law, which speaks only of a third in discord"; she again cited several other cases in which petitioners "were all freed at the decision of the third in discord." Piernas denied Elena's petition and ordered that an entirely new appraisal process be initiated. While the court record ends without revealing whether Elena ultimately triumphed in her efforts to free her son, the episode demonstrates that slaves and their free relatives knew how to navigate the local court system in their efforts to liberate themselves.[22]

Slaves also knew that unfavorable decisions could be appealed to the higher court in Havana, as María Isabel and Rosa did in April 1776 when they forced a New Orleans alcalde to overturn his decision against them. María Isabel and Rosa petitioned the court after the heirs of Renato Chouteau, their recently deceased owner, violated the manumission that Chouteau had granted to them the previous year. "On the condition that [they] serve him as long as he lived," Choteau had granted freedom to the two women as well as Rosa's two young children, explicitly declaring "that after his death, neither his heirs, nor assigns may contradict this nor reclaim them in any manner." Doing precisely that, however, the estate's executors argued against the enslaved women and convinced *alcalde* Pierre Henri Derneville that the widow's property right in her husband's estate was superior to the slaves' right to their freedom, even when it had been legally promised. Derneville nullified the manumissions, declaring that Chouteau's estate would "be exceedingly small after the decedent's debts, funeral expenses, and his wife's dowry are paid and certainly much less than the appraised value of the slaves."[23]

María Isabel and Rosa filed an appeal with Governor Unzaga. They denied that Choteau's estate was as impoverished as the executors had asserted and accused Derneville of making his ruling without advice from the *letrado*, the formally trained judicial official who was assigned to interpret the law and advise the presiding judge, who was most often not educated in legal matters.[24] At their request, Unzaga sent the case files to Havana, where *letrado* Ignacio de Urrutia weighed in on the matter. According to Urrutia, Rosa's youngest child, who had not yet been born at the time that Chouteau had granted his mother her freedom, should be considered freeborn, thus establishing the principle that once a woman had been legally promised freedom (via either a conditional manumission or a *coartación* agreement that had not yet been fully paid for), her own continuing status as a slave would not be passed along to any subsequent children. He also advised that the executors' argument that the court should consider the impact of the manumissions of the value of the estate was "without place." He did acknowledge, however, that by freeing the three slaves, valued together at nearly eight hundred pesos, Chouteau had violated his marriage contract, which permitted him to dispose of only one-fifth of his estate. Urrutia thus recommended that María Rosa and Isabel be held liable for the amount of their value over and above that one-fifth. All parties concerned consented to this advice. Derneville revoked his earlier ruling that had nullified the manumissions but decreed that the "amount must be earned before they may enjoy the full use of their freedom." Despite having to pay for at least part of their value, María Isabel and Rosa's recourse to a higher judicial authority resulted in their eventual freedom.

So how did enslaved New Orleanians acquire this knowledge that they used with such great effect? Neither O'Reilly nor any subsequent Spanish official publicly decreed the imposition of Spanish manumission policies, yet within two years, notaries, owners, and slaves were engaged in manumission practices that violated the French Code Noir. Before tracing the case for *coartación*, I briefly explore another right slaves had and utilized under Spanish rule.

The Spanish regime not only introduced *coartación* into Louisiana but also, in one of its very first official decrees, prohibited the enslavement of native peoples to bring the formerly French colony in line with the rest of Spain's American colonies, where indigenous slavery had been (theoretically) outlawed since the New Laws of 1542. To accommodate existing practices, however, the Crown modified its laws to allow "present owners" to re-

tain any slaves they already owned while prohibiting their sale or transfer to any other owner.[25] Although several slaves of native ancestry were manumitted in the years following this decree, only one owner explicitly credited it in describing his motives. At least two slaves with indigenous ancestry filed self-purchase suits, but they too failed to note their right to uncompensated freedom because of their ancestry.[26]

The first slaves to file petitions requesting freedom because of their native ancestry did not do so until 1790, twenty-one years after O'Reilly's decree, when *Indios mestizos* Pedro Morau and María Page sued their deceased owner's heirs for trying to sell them in violation of the 1769 decree.[27] The siblings had recently moved to New Orleans from Upper Louisiana, where their former owner, Francisco de Cruzat, had been the post commandant at St. Louis. In that capacity, Cruzat had been ordered in 1786 to republish O'Reilly's ban on the purchase, sale, or leasing of indigenous slaves after it had come to the attention of Governor Esteban Miró that dozens of such slaves were still being held in the colony's interior regions.[28] It is likely that Morau and Page became aware of the law by 1786 and realized that upon Cruzat's death, they were entitled to their freedom. It was particularly fortuitous that Cruzat had relocated them to the colonial capital since having access to New Orleans's courts certainly facilitated the process. In another suit, petitioner Baptiste included a request that the court prevent his owner removing him from the city, a move that would have interfered with his ability to press his freedom suit.[29] Several other slaves quickly followed this lead, and until late 1793, all won their freedom based on claims of indigenous ancestry. As increasing numbers of slaves filed these petitions, requesting their freedom without any consideration of compensation to their owners, the governor, acting at the urging of slave owners, suspended all suits "until his Majesty issues a resolution on the status of *Mestizo* and Indian slaves."[30]

Given that O'Reilly's original 1769 decree did not mandate that existing slaves be freed and given that most enslaved persons with indigenous ancestry lived far from the center of Spanish judicial power in New Orleans, it is not unsurprising that it took slaves two decades to mobilize this legal principle into practice. And given the trajectory of the initial petitioners, it seems fairly clear that Morau and Page were the hub for the spread of this knowledge and that in light of the early successes, more and more slaves tried to utilize this principle to gain freedom. In one way, this freedom principle was even more radical than a policy of self-purchase since it required

owners, willing or not, to free slaves without compensation. As owners saw it, this principle could also free slaves who invented their indigenous ancestry and did not really deserve freedom. In the end, this provision affected far fewer slaves than did *coartación* because owners mobilized in opposition and because far fewer slaves were of indigenous ancestry.[31]

Unlike the ban on the enslavement of native peoples, however, no decree on *coartación* was ever published in Louisiana. Yet as early as 1771, slaves were filing petitions to force unwilling owners to grant freedom. Slaves quickly learned that self-purchase was the surest avenue to freedom: they could initiate it themselves, and the courts were willing to enforce it against reluctant owners, although few slaves were forced to appeal to the courts. But just where did this knowledge come from? The evidence suggests three possibilities. The first is that sympathetic Spanish bureaucrats, most of whom came from elsewhere in the Americas, informally spread the word. Although slaves were clearly counseled by the Spaniards and Franco-Creoles who penned their petitions, it is doubtful that initial knowledge of *coartación* came from these sources, as Spanish officials spent the first several years of their regime trying to reconcile Franco-Creoles to their incorporation into the Spanish empire. It is unlikely, therefore, that Spanish bureaucrats would have deliberately provoked prominent planters' hostility by encouraging their slaves to sue for freedom.

A second but also unlikely scenario involves two runaway slaves who reached Cuba before being discovered and returned to Louisiana in 1748. They reported to officials that several other enslaved Louisianans were living happily and apparently freely in Havana.[32] Perhaps they also reported to other slaves that Cuban slaves had the right of self-purchase. This knowledge could have circulated among enslaved New Orleanians over the next two decades until they could take advantage of it with the arrival of the Spanish. The final and most likely source of this information, however, was the two hundred free militiamen of African descent from Havana who accompanied Governor O'Reilly in 1769. Many of them may have acquired their own freedom through *coartación* or were at least familiar with the process.[33] During their several months in Louisiana, it is not hard to imagine that they talked with local slaves about the relative merits of Spanish rule and about *coartación*.

However the knowledge of *coartación* or the ban on indigenous slavery was acquired, enslaved persons in Spanish New Orleans demonstrated their legal acuity and fought for their right to freedom. Within just two years of

O'Reilly's imposition of Spanish policies (implicitly including *coartación*), slaves were cognizant of their right to request their compensated freedom. Knowledge of these rights as well as of the process of *coartación* and the ideology underpinning it quickly became widespread, as several petitions from the early 1780s illustrate. María Theresa requested permission to "redeem herself from slavery through legal means" and stressed "her right to ask [for her freedom] according to law and the Royal Ordinances of the Sovereign." Michel asserted his right to "the franchise the law concedes to him to claim his freedom," and María drew up her petition "using the faculties conceded to her by law." *Libres* (as free persons of African descent were known in Spanish New Orleans) also filed petitions "in conformity to law" when they sought appraisals for their enslaved relatives.[34]

Although not every suit resulted in manumission, the overwhelming majority did. And even though only 124 enslaved persons had to litigate their right to *coartación*, their ability to call on the court—and the court's willingness to rule in their favor—affected many other slaves by encouraging owners to negotiate voluntarily with their slaves for freedom. Compared to the French era, in which fewer than 150 slaves acquired freedom over a four-decade period, or the post–Louisiana Purchase era, when the number of manumissions each year dropped by 50 percent after Spanish-era manumission policies were invalidated, slaves in Spanish New Orleans had a far greater chance at acquiring freedom, a process facilitated in part by Spanish law and judicial officials. But more important, slaves themselves, risking the scorn and retribution of their owners, took advantage of the very few rights granted them by suing for freedom. In doing so, they asserted that the law mattered.

The impact of these slaves' suits is demonstrated in the number of uncontested manumissions that took place during the Spanish era. The great majority of *coartación* cases did not require a court's intervention but consisted of voluntary agreements between owners and slaves regarding the price of freedom. Owners' willing participation in the self-purchase process can also be inferred by the gap between the prices they demanded for a *coartación* and those they had to pay to purchase a new slave (see figure 6). These prices fluctuated in correlation with each other during the last third of the eighteenth century. Both increased steadily during the 1770s, decreased slightly as more slaves were available for purchase in the 1780s, and then rose again during the last years of the century in response to increased demand with the success of sugar cultivation and the 1795 ban on

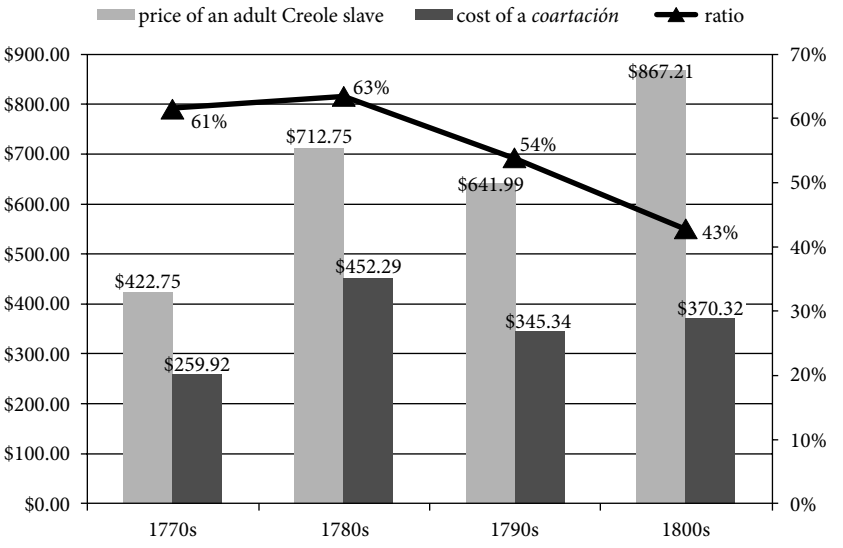


FIGURE 6. Average Price (in pesos) of *Coartacións* and Slave Sales by Decade. Slave sale prices based on Gwendolyn Midlo Hall, "Mean Prices by Gender, Origin and Decade," *Afro-Louisiana History and Genealogy, 1718–1820*, 2001, http://www.ibiblio.org/laslave/calcs/prices.html (accessed April 30, 2012); *coartación* costs based on Kimberly S. Hanger, *Bounded Lives, Bounded Places: Free Black Society in Colonial New Orleans, 1769–1803* (Durham: Duke University Press, 1997), 31, table 1.6.

slave imports. Despite rising prices and demand, however, purchasing one's freedom became cheaper in relation to the cost of a Creole slave (who was more likely to be freed than an African-born slave). During the 1770s and 1780s, the average price of a *coartación* was nearly two-thirds of the mean price for a Creole slave, but that proportion dropped to around half during the 1790s and to about two-fifths by 1803.

As the case of the *Indios mestizos* Pedro Morau and María Page demonstrates, slaves who had access to the courts were better positioned to take advantage of the new laws and legal practices in their pursuit of freedom. This privileging acquired additional importance in the late eighteenth century because Spanish law was more clearly in place and enforced in New Orleans than in the hinterlands, where many French legal practices continued.[35] Cities provided more than access to the courts, however, and urban slaves found themselves with better economic opportunities to earn their purchase prices as well as more developed networks of financial, emotional, and logistical supporters who could loan money or testify on one's behalf.

As significant as knowledge of Spanish law and judicial procedure was, it was not sufficient. Slaves engaged in claims-making also relied on a variety of third parties, those whom historians de la Fuente and Ariela Gross have called "legal mediators": notaries, lawyers, price assessors, and others who facilitated slaves' desires for freedom.[36] There were the notaries who drew up petitions, adding the appropriate legalese, and the appraisers whom slaves named to assess their value. The appraisers appointed by slaves typically returned lower valuations than those appointed by owners, suggesting the appraisers' participation in facilitating slaves' desires for freedom. There were also the family members, friends, and lovers who gave slaves the money they needed for their purchase price and the fees they owed to notaries, appraisers, and other court officials. Most important, however, were the *alcaldes*, many of whom were Franco-Creoles; the Spanish governors, who sat in judgment of these cases; and the *letrados* who advised those judges.

Most *alcaldes* were satisfied just to rule on the cases that appeared before them. When slaves who had been promised freedom by their deceased mistress, Pelagia Lorreins, complained to *alcalde* Guy Dufossat that Lorreins's testamentary executor had failed to fulfill her bequest, Dufossat ordered their emancipations to be issued within one day.[37] One *alcalde* went beyond ordering an owner to issue a *carta*, issuing it himself. In March 1798, *negro* Josef Ginefry appeared before Pedro Marin Argote, declaring that he had paid his owner, Nicolas Verbois, four hundred pesos for his freedom. Argote ordered Verbois to issue Ginefry's *carta*. Two months later, however, he learned, probably from Ginefry, that Verbois had ignored the order. Argote again ordered Verbois to appear before a notary and grant his slave freedom. When Verbois still had not done so five days later, the *alcalde* himself went to the notary and issued Ginefry's *carta*.[38]

Not all *alcaldes* were as supportive of slaves' claims as Argote, however. Jacinto Panis ruled both for and against enslaved petitioners. In a highly contested case, Panis declared Margarita's *carta* valid despite clear evidence that she had been freed by her deceased owner's husband, who did not have the authority to do so.[39] Yet in another case, one of the few that is consistently cited as evidence that Spanish-era judicial authorities did not respect slave claims to freedom,[40] Panis not only denied a slave's claim that her owner and former consort had reneged on a promise to free her for a price but also sentenced her "to perpetual silence," forbidding her from making any future demands for freedom and ordering her to "respect [her owner] as a slave should her master." Panis was clearly not opposed to manumis-

sion, as demonstrated by his own *graciosa* manumission of an elderly slave who had served him for just a year and a half.[41] In another case in which he served as a witness rather than a judge, Panis supported Maturina's claims that she had negotiated a purchase price with her owner, *mulata libre* Naneta Chabert, and testified that he had received one hundred pesos from Maturina to pass along to Chabert toward her purchase price.[42]

Slaves often found more support, at least for their right to engage in these legal processes, from the *letrados*. Josef, who had belonged to the recently deceased Pierre Degout Fleury, ultimately failed to win his freedom but found a sympathetic listener in *letrado* Juan del Póstigo. In a case that began before Governor Miró in August 1783, Josef claimed that Fleury had often talked about emancipating him "as a reward for his good and faithful services," and, indeed, several *blanco* witnesses testified to this fact, claiming even that Fleury had written out a note to this effect but had failed to sign it. One asserted that just forty-eight hours before his death, Fleury had declared, "It would not be just that [Josef] should remain a slave." The attorney for the estate's heirs, however, dismissed Josef's demand as "unfounded" and declared, "he has neither the right nor any legal grounds for claiming his freedom, because he has not presented any document authorizing it, and the testimony which his witnesses have given does not amount to anything, since Fleury was nearly always drunk." Josef's case was lost when one of the court's *escribanos*, Fernando Rodríguez, testified that the day before Fleury's death, the owner had rejected Josef's request for freedom in the *escribano*'s presence. Although Josef failed in his efforts, his case demonstrates Euro-Louisianan support for slaves' claims to freedom. Not only did several *blancos* testify in support of Josef's claim, but *letrado* Póstigo twice recommended that the court rehear Josef's subsequent petitions in 1790.[43] Póstigo's willingness repeatedly to open the door to Josef's claims illustrates Spanish officials' role in facilitating slaves' desire for freedom, even though it did not guarantee that those desires would be satisfied.

Not all Spanish officials were as receptive to slaves' requests as Póstigo, however. Governor Bernardo de Gálvez attempted to end the practice of *coartación*, arguing that it was a function of Cuban law inapplicable to Louisiana. His opportunity came during a long and drawn-out case that began in February 1776, when *negra* María Juana petitioned Gálvez's predecessor, Unzaga, requesting her *coartación*. She accused her owner, Juan Suriray de la Rue, and his wife of cruel treatment, which she blamed on the fact that she had been Suriray's consort before his marriage. María Juana appealed to

Unzaga "to entreat the fair administration of justice that His Lordship distributes." Despite initially appearing sympathetic to María Juana's case, Unzaga revoked his first order for the *coartación* to proceed after Suriray filed suit against Englishman Edward Jenkins and *mulata libre* Maríana Deslattes for harboring María Juana as a fugitive and abetting her in her pursuit of freedom, thus beginning a legal battle that lasted fourteen months and involved judicial officials in New Orleans and Havana.[44]

According to María Juana and her witnesses, she had pleaded with Jenkins to buy her from Suriray, detailing the cruel abuse she suffered for two years. Jenkins and Deslattes attempted to negotiate with Suriray but could not agree on a price, and shortly thereafter, all parties found themselves in court. The case quickly spiraled out of control as Jenkins and Suriray accused each other of all sorts of illicit behavior. Seeking counsel, Unzaga sent a copy of the case records—comprising more than three hundred pages—to *letrado* Guillermo Veranes in Havana. Veranes's advice arrived back in New Orleans in May 1777, and Gálvez, who had by then replaced Unzaga, called the parties back into court to hand down his decision. Following Veranes's recommendation, Gálvez dismissed the case against Jenkins, ruling that Suriray had failed to prove that Jenkins was guilty of abetting María Juana's escape.

But Gálvez pointedly disagreed with Veranes's recommendation that María Juana's *carta* be drawn up for the estimated price "as is customary in this island, in like cases." In her original plea to the court, María Juana had claimed that "her master can not and must not deny her her liberty nor is there a law to the contrary"; indeed, she argued, "Divine Law [was] in her favor [as] no Christian is obliged to remain in captivity as she, herself, is continually exposed to punishment where through suffocation or desperation she might die." Suriray had responded that she had "no right to extract her liberty. . . . In the laws of Spain there is no obligation for the master to free or alienate a slave or to destroy his property." On the contrary, he continued, "the master is the absolute owner of his slaves as well as his other property with the faculty to free and to dispose of them at his own free will." Gálvez concurred with Suriray and dismissed María Juana's claims to a right of liberty or to be freed from abusive captivity. He denied that the 1768 Royal Cédula confirming *coartación* in Cuba had any authority in Louisiana, a colony that was "governed by the general laws of the Kingdom as it has been previously arranged."

María Juana had the misfortune to have her case pending when Gálvez

succeeded Unzaga as governor. Unzaga had shown himself to favor *coartación*, earlier noting that it was "done in the interests of His Most Christian Majesty," and it is likely that he would have followed Veranes's advice to allow María Juana to purchase her freedom.[45] Gálvez, conversely, was hostile to the idea that slaves could force their owners to free them, even with compensation. More than any other Spanish governor, at least through 1795, Gálvez appears to have sympathized with the local elite against liberalizing manumission; the year after María Juana's case, he sided with the Cabildo in its failed effort to enact a more stringent slave code.[46] Yet despite Gálvez's denial that enslaved Louisianans had a right to freedom, *coartación* continued to be practiced, with more than one hundred uncontested cases and at least ten litigated ones during the remainder of his five years in office, although most of the latter emerged from hearings overseen by *alcaldes* rather than Gálvez himself.[47]

Gálvez later authorized at least one *coartación* and in another case ruled in favor of a former slave whose owner attempted to reclaim her. In 1779, Gálvez oversaw a case pursued by Mateo Platilla, who sought to free Ignez, probably his consort, from her owner. In this instance, Gálvez may have overcome his general opposition to the principle of *coartación* because Platilla had served under his command at the Battle of Baton Rouge a few months earlier.[48] A year later, Gálvez rebuffed the plea of Pedro Methode, who tried to deny that he had granted María dit Mariquine her freedom. His former slave produced a document dated April 1779 and signed by Methode that stated "that he permits her to go with her son, Charles, where she please, to live, because he has given her her freedom, since July, last, which he ratifies by the present." In addition to documentation of her freedom, she asserted that since July 1778, she had in fact "enjoyed her liberty peacefully as is known to everyone in" New Orleans. Although Methode tried to claim that this document was just a travel pass, Gálvez rejected those assertions and ordered Methode to issue María a formal *carta*, threatening him with another suit if he failed to do so.[49]

Gálvez's antagonism toward *coartación* foreshadowed the changes that would follow the Louisiana Purchase. After 1803, slaves continued to find some judicial authorities sympathetic toward their freedom struggles, but their avenues to legal freedom were very quickly foreclosed as Anglo-American politicians moved to end what they saw as the permissive manumission laws of the Spanish era. Beginning in 1807, the legislature systematically restricted slaves' access to legal freedom; by 1857, manumission

had been completely prohibited. These efforts began by attacking one of the most important Spanish contributions, with the first article of the 1807 act declaring that "no person shall be compelled, either directly or indirectly, to emancipate his or her slave or slaves," thus nullifying the most important provision of *coartación*. Slaves could still purchase their freedom, but only with their owners' consent. The 1807 act also limited manumission to slaves who were at least thirty years old and who had carried themselves with "an honest conduct" for the previous four years. Exceptions could be made for slaves who had "saved the life of their master, his wife, or any of his children."[50]

The two main targets of the 1807 law—*coartacións* and the emancipation of slaves under thirty—were immediately affected. Between the Louisiana Purchase and the passage of the law in March 1807, manumission rates had dropped back to that of the mid-1790s, when about 60 slaves were freed each year, about half of them under thirty and one-third *coartacións*. In the decade following the implementation of these restrictions, just under 40 slaves received their freedom each year: a quarter were under thirty, and fewer than one in five received their freedom through purchase. The year 1807 was exceptional, as slaves and their owners took advantage of the delay between the passage of the act and its implementation to free themselves: 101 slaves were freed during this six-month period, and two-thirds of them fell into the newly defined "too young to be manumitted" category. More than half of all these manumissions involved purchase.[51]

The presence of Spanish law and its enactment by judicial officials clearly had an impact on New Orleans's enslaved population, as slaves quickly became cognizant of their new legal rights and engaged in frequent and persistent efforts to gain their freedom. Yet they did so precisely when conditions for the enslaved were rapidly deteriorating as a result of the expansion of the plantation economy in the last quarter of the eighteenth century. Far more people of African ancestry found themselves enslaved in Louisiana after the Spanish reopened the slave trade in 1777, while slave owners could afford to treat their slaves more callously knowing that they were now easily replaceable. As many historians have insisted, Spanish laws did little to mediate the actual experience of enslavement, especially in conjunction with an expanding plantation economy. But does this mean that the law did not matter?

New Orleans's system of slavery was indeed significantly shaped by the Spanish legal regime and particularly by its institutionalization of manu-

mission as a central feature of that system, offering enslaved people a substantial chance to remake themselves as free. Owners could now free their slaves without the judicial oversight that French law had demanded. While some owners may have sought to rid themselves of elderly or invalid slaves, the rapidity with which they took to freeing their slaves in much larger numbers than before 1763 and the persisting high rate of *graciosa* manumissions throughout the era suggests that at least some were taking advantage of Spanish law's liberalization of manumissions. While many owners helped to facilitate the process of manumission, freeing their slaves voluntarily, both with and without compensation, Spanish judicial officials played a significant role in demonstrating their readiness to defend aspirations for freedom. The most important actors, however, were the slaves, who not only helped shape the implementation of Spanish policy, especially in the case of *coartación*, but also eagerly used their awareness of the new policies and of sympathetic Spanish officials to pressure owners for freedom. Despite the relatively short duration of the Spanish regime between the foundational French era and the increasingly restrictive Anglo-American one, many New Orleanians of African ancestry redeemed themselves from slavery and in so doing made the law matter.

NOTES

1. *Catherina v. Estate of Juan Bautista Destrehan*, June 1773, Abstracts of the Spanish Judicial Records published in the *Louisiana Historical Quarterly* (SJR *LHQ*) 9, no. 3 (1926): 556–58; Manumission of Catalina and Felicité, November 6, 1773, Notarial Acts of Andrés Almonester y Roxas, vol. 3, folios 287v–290, New Orleans Notarial Archives Research Center. (Hereafter, Notarial Acts are cited as "Acts of" followed by the notary's name and volume and folio numbers.)

2. Frank Tannenbaum, *Slave and Citizen* (New York: Knopf, 1946).

3. For an analysis that argues for the importance of "different ecologies, settlement patterns, demographic regimes, staple systems, and slaveowners' way of life" instead of "divergent legal systems, national cultures, and church-state relations," see Philip D. Morgan, *Slave Counterpoint: Black Culture in the Eighteenth-Century Chesapeake and Lowcountry* (Chapel Hill: University of North Carolina Press for the Omohundro Institute of Early American History and Culture, 1998), xvi. For a recent overview of the criticisms of Tannenbaum, see Alejandro de la Fuente, "From Slaves to Citizens? Tannenbaum and the Debates on Slavery, Emancipation, and Race Relations in Latin America," *International Labor and Working-Class History*, 77, no. 1 (2010): 154–73; for a recent defense, see Sally E. Hadden, "The Fragmented Laws of Slavery in the Colonial and Revolutionary Eras," in *The Cambridge History of Law in America*, vol. 1, *Early America (1580–1815)*, ed. Michael Grossberg and Christopher L. Tomlins (Cambridge: Cambridge University Press, 2008), 253–87, especially 261–62 (arguing that the laws decreeing some minimal protection of slaves were significant even if their mitigating impact is unclear).

4. And many scholars have done so, reaching varying conclusions. Baade argues that a comparison of legal practices in French and Spanish Louisiana upholds Tannenbaum's argument but acknowledges that enforcement was stronger in New Orleans than in the hinterlands, where Spanish authority was weaker. See Hans W. Baade, "The Law of Slavery in Spanish *Luisiana*, 1769–1803," in *Louisiana's Legal Heritage*, ed. Edward F. Haas (Pensacola, Fla.: Perdido Bay, 1983), 43–86. Rankin, conversely, argues that "Louisiana's Latin heritage failed to soften slavery, encourage manumission, and foster egalitarian race relations" and that the Louisiana case study gives support to the "growing consensus among historians that differences in the nature of slavery and race relations in the New World depended less upon cultural, religious, and legal traditions than upon demographic and economic conditions." See David C. Rankin, "The Tannenbaum Thesis Reconsidered: Slavery and Race Relations in Antebellum Louisiana," *Southern Studies* 18, no. 1 (1979): 31. Ingersoll argues that metropolitan-authored slave codes, like those cited by Tannenbaum, outlined an idealized version of how slave societies should function but that since enforcement was left to local officials, who were often slave owners, these codes are unreliable guides to slave treatment. Although he admits that *coartación* was a significant Spanish introduction, he concludes that French, Spanish, and Anglo-American legal regimes were more remarkable for their similarities than for their differences. See Thomas N. Ingersoll, "Slave Codes and Judicial Practice in New Orleans, 1718–1807," *Law and History Review* 13, no. 1 (1995): 23–62; Thomas N. Ingersoll, *Mammon and Manon in Early New Orleans: The First Slave Society in the Deep South, 1718–1819* (Knoxville: University of Tennessee Press, 1999), 221.

5. Philip D. Morgan, "British Encounters with Africans and African-Americans, circa 1600–1780," in *Strangers within the Realm: Cultural Margins of the First British Empire*, ed. Bernard Bailyn and Philip D. Morgan (Chapel Hill: University of North Carolina Press for the Omohundro Institute of Early American History and Culture, 1991), 181.

6. Alejandro de la Fuente, "Slave Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited," *Law and History Review* 22, no. 2 (2004): 339–69.

7. Of course, there were also extralegal means to freedom. Slaves could and did run away and try to pass as free.

8. Paul Lachance, "Louisiana Census Data Set," in *Databases for the Study of Afro-Louisiana History and Genealogy, 1699–1860: Computerized Information from Original Manuscript Sources*, ed. Gwendolyn Midlo Hall (Baton Rouge: Louisiana State University Press, 2000).

9. For the French era, it is not always possible to verify whether a manumission was ratified; however, in the discussion that follows, I use *manumission* and *manumitted* to mean a promise of freedom that was in some way followed up on even if it is not possible to determine the final outcome. My analysis is based on "Louisiana Free Database, 1719–1820," in *Databases for the Study of Afro-Louisiana History*, as well as my own reading of the Sacramental Records of the St. Louis Cathedral, Archives of the Archdiocese of New Orleans; the Notarial Acts housed at the New Orleans Notarial Archives Research Center; the Records of the Superior Council; and, most important, the Spanish Judicial Records (SJR). Originals of both the Superior Council and Spanish Judicial records are held at the Louisiana State Museum, New Orleans; microfilm copies are available at several New Orleans's area archives, including the Tulane Law Library, Tulane University; and abstracts of both collections were published in the *Louisiana Historical Quarterly*.

10. Real Cédula al Gobernador de la Habana, ordenándole haga observar el método y reglas que se expresan, en la exacción del derecho de alcabala de la venta de los

negros esclavos coartados de aquella isla, June 21, 1768, in *Colección de documentos para la historia de la formación social de hispanoamérica, 1493–1810*, ed. Richard Konetzke (Madrid: Consejo Superior de Investigaciones Científicas, 1958–62), 3:339. On the development of *coartación* in Cuba, see Herbert S. Klein, *Slavery in the Americas: A Comparative Study of Virginia and Cuba* (Chicago: University of Chicago Press, 1967), 62–65, 78 n. 62, 195–200; Rebecca J. Scott, *Slave Emancipation in Cuba: The Transition to Free Labor, 1860–1899* (Princeton: Princeton University Press, 1985), 13–14, 74–75; de la Fuente, "Slave Law." On its arrival in Louisiana, see Kimberly S. Hanger, *Bounded Lives, Bounded Places: Free Black Society in Colonial New Orleans, 1769–1803* (Durham: Duke University Press, 1997), 25.

11. Lachance, "Louisiana Census Data Set."

12. In the eight Virginia counties studied by Wolf, slaves had a 1 in more than 600 chance of acquiring their freedom in 1790, a rate that declined to 1 in more than 1,000 by 1800. For Antigua, Gaspar found that slaves had a roughly 1 in 450 chance. See Eva Sheppard Wolf, *Race and Liberty in the New Nation: Emancipation in Virginia from the Revolution to Nat Turner's Rebellion* (Baton Rouge: Louisiana State University Press, 2006), 46 (table 1), 78 (table 5); David Barry Gaspar, "'To Be Free Is Very Sweet': The Manumission of Female Slaves in Antigua, 1817–26," in *Beyond Bondage: Free Women of Color in the Americas*, ed. David Barry Gaspar and Darlene Clark Hine (Urbana: University of Illinois Press, 2004), 62. Slaves in Louisiana continued to be manumitted at a far greater rate than those in the rest of the South as late as 1860. See Shawn Cole, "Capitalism and Freedom: Manumissions and the Slave Market in Louisiana, 1725–1820," *Journal of Economic History* 65, no. 4 (2005): 1013 n. 23.

13. Paul Lachance, "The Politics of Fear: French Louisianians and the Slave Trade, 1786–1809," *Plantation Societies in the Americas* 1, no. 2 (1979): 162–97.

14. Hanger, *Bounded Lives, Bounded Places*, 20, fig. 1.1.

15. Manumission of Bautista, March 30, 1771, Acts of Juan Bautista Garic, 2:112–12v.

16. Calculations based on "Louisiana Free Database."

17. Manumission of Juana Catalina, December 14, 1771, Acts of Andrés Almonester y Roxas, 1:242–44v.

18. *Michel v. Françoise Girardy*, October 9, 1783, SJR *LHQ* 22, no. 1 (1939): 269–71; Manumission of Michel, October 13, 1783, Acts of Fernando Rodríguez, 1:900.

19. For examples of cases in which owners resisted the appraisal process by failing to respond to court warrants or by countersuing their slaves, see *Bernarda Arciny, Negress Slave, v. Francisco Daniel Dupain*, January 14, 1783, SJR *LHQ* 20, no. 1 (1937): 266–68; *María Theresa v. Marie-Françoise Girardy, Widow Desruisseau*, September 4, 1782, SJR *LHQ* 19, no. 2 (1936): 512–15.

20. *Valentin v. Succession of Andres Juen*, September 23, 1784, SJR *LHQ* 24, no. 4 (1941): 1274–80; Succession of Andres Juen, Inventory and Appraisement of His Estate, September 14, 1784, SJR *LHQ* 24, no. 4 (1941): 1258–74.

21. *Catherina v. Estate of Juan Bautista Destrehan*, 556–59.

22. *Elena v. Henrique Desprez*, August 12, 1780, SJR *LHQ* 14, no. 3 (1931): 619–21; Manumission of Nata Andres, March 8, 1779, Acts of Andrés Almonester y Roxas, 1:262.

23. Details and quotations in this and the following paragraph come from the following sources: Succession of Renato Chouteau, April 21, 1776, SJR *LHQ* 11, no. 3 (1928): 513–19; Manumission of Rosa, María Juana dit Lucita, and Renaldo, May 20, 1775, Acts of Juan Bautista Garic, 6:152; Manumission of María dit Lizette, May 26, 1775, Acts of Juan Bautista Garic, 6:153.

24. In Spanish New Orleans, the courts comprised the governor or one of the city's two *alcaldes* serving as the presiding judge, an *escribano* (scribe, usually chosen from among the city's notaries), and the *letrado*. New Orleans's *letrado*, Cecilio Odoardo, had been absent from the city during the initial hearings. See Henry P. Dart, "Civil Procedure in Louisiana under the Spanish Regime as Illustrated in Loppinot's Case, 1774," *Louisiana Historical Quarterly* 12, no. 1 (1929): 34–35; Baade, "Law of Slavery," 56–58.

25. O'Reilly, Proclamation, December 7, 1769, in *Spain in the Mississippi Valley, 1765–1794: Translations of Materials from the Spanish Archives in the Bancroft Library*, ed. Lawrence Kinnaird (Washington, D.C.: U.S. Government Printing Office, 1945), vol. 2, pt. 1, pp. 125–26. O'Reilly also ordered the commandants to make a census of all indigenous slaves in their posts, listing their names, their ages, their sex, their descent, the names of their masters, and their estimated prices. At least two posts complied. See Indian Slaves at Ste. Geneviève, May 28, 1770, in *Spain in the Mississippi Valley*, ed. Kinnaird, 1:167–70; Declarations Received by Pedro Piernas Concerning Indian Slaves at St. Louis, July 12, 1770, in *Spain in the Mississippi Valley*, ed. Kinnaird, 1:172–79; Stephen Webre, "The Problem of Indian Slavery in Spanish Louisiana, 1769–1803," *Louisiana History* 25, no. 2 (1984): 117–35. Louisianans would later recollect O'Reilly's decree, and at least some remembered it as immediately freeing all indigenous slaves. See testimonies of Jean B. Reviere and Marguerite Reviere, *Marguerite v. Chouteau*, 2 Mo. 71 (May 1828), 72–73.

26. Manumission of Marie Anne and Son, May 11, 1770, Natchitoches, cited in "Louisiana Free Database"; Manumission of Juan, April 2, 1783, Acts of Rafael Perdomo, 2:97; *Juaneta vs. Mr. Moroteau*, August 21, 1783, SJR, and SJR *LHQ* 21, no. 3 (1938): 951–54; Manumission of Juanita, September 6, 1783, Acts of Fernando Rodríguez, 1:794.

27. *Pierre v. Cruzat Heirs*, May 4, 1790, SJR; Manumission of Pedro Morau, May 10, 1790, Acts of Rafael Perdomo, 15:254–55; Manumission of María Page, May 6, 1790, Acts of Rafael Perdomo, 15:243–44. See also Webre, "Problem of Indian Slavery," 125.

28. Esteban Miró to Francisco de Cruzat, April 10, 1786, Archivo General de Indias, Papeles Procedentes de Cuba, microfilm copies consulted at the Historic Collection of New Orleans, legajo 4, folios 366–66v.

29. *Baptiste v. Bourgignon*, January 23, 1790, SJR, doc. 2.

30. *Ignacio v. Estate of Juan Soubie*, November 8, 1793, Court Proceedings of Francisco Broutin, New Orleans Notarial Archives Research Center, vol. 24, folio 136v. A year and a half later, Carondelet issued his own guidelines for dealing with these cases despite having had no word from the Crown. See Representación de varios habitantes sobre esclavos indios Natchez, 1794–95, Archivo General de Indias, Audiencia de Santo Domingo, microfilm copies at the Historic Collection of New Orleans, legajo 2532, folios 610v–12v.

31. For a fuller exploration of these cases, see Jennifer M. Spear, *Race, Sex, and Social Order in Early New Orleans* (Baltimore: Johns Hopkins University Press, 2009), chapter 6.

32. Procuration, September 1, 1744, Records of the Superior Council Index, *LHQ* 13, no. 1 (1930): 156; Pierre de Rigaud, Marquis de Vaudreuil, to Jean-Frédéric Phélypeaux, Comte de Maurepas, March 20, 1748, Archives des Colonies, Archives Nationales de France, microfilm copies at the Historic Collection of New Orleans, series C13a, vol. 32, folios 31–34v; Declaration by Fugitive Negroes, Manuel and John, Belonging to M. de Benac, March 22, 1748, Records of the Superior Council (originals).

33. When José Antonio Aponte, a captain in Havana's free black militia, was arrested for his alleged involvement in a series of 1812 revolts in Cuba, three handwritten copies of Real Cédulas concerning the rights of militiamen were found in his possession. Free

people of color, particularly militiamen, clearly were aware of relevant Spanish laws. On Aponte and the legal acuity of slaves and free people of color in Havana more generally, see Matt D. Childs, *The 1812 Aponte Rebellion in Cuba and the Struggle against Atlantic Slavery* (Chapel Hill: University of North Carolina Press, 2006), 3, 63–66; de la Fuente, "Slave Law," 339–69.

34. *María Theresa v. Marie-Françoise Girardy, Widow Desruisseau*, 512–15; *Michel vs. Françoise Girardy*, 269–71; *María v. Succession of Francisca Plazan*, May 10, 1782, SJR *LHQ* 18, no. 3 (1935): 749–50; *María Theresa v. Estefania de Guyon*, February 24, 1785, SJR *LHQ* 26, no. 4 (1943): 1197–99.

35. Hans W. Baade, "Marriage Contracts in French and Spanish Louisiana: A Study in 'Notarial' Jurisprudence," *Tulane Law Review* 53, no. 1 (1979): 1–92.

36. Alejandro de la Fuente and Ariela Gross, "Comparative Studies of Law, Slavery, and Race in the Americas," *Annual Review of Law and Social Science* 6 (2010): 472.

37. Succession of Pelagia Lorreins, Wife of Andres Jung, September 7, 1781, SJR *LHQ* 17, no. 1 (1934): 213–18.

38. Manumission of José Ginefry, May 12, 1798, Acts of Pedro Pedesclaux, 31:359–61.

39. *Claude Guillory v. Michel Barre and Margarita*, January 20, 1781, SJR *LHQ* 15, no. 3 (1932): 545–46.

40. See, e.g., Ingersoll, *Mammon and Manon*, 224.

41. For Panis's manumission, see Sale of Slave, January 10, 1775, Acts of Andrés Almonester y Roxas, 5:9; Manumission of Miguel, May 30, 1776, Acts of Juan Bautista Garic, 7:171–72.

42. *Francisco Broutin v. Naneta Chebert, Mulata Libre*, January 24, 1780, SJR *LHQ* 14, no. 2 (1931): 278.

43. [*Joseph v. Degout Succession*], August 8, 1783, SJR *LHQ* 21 (1938): 939–40, 947–50.

44. All details and quotations in this and the following two paragraphs are drawn from the following sources: *María Juana, a Negress Slave, v. Juan Suriray de la Rue*, February 28, 1776, SJR *LHQ* 11, no. 3 (1928): 338–40; *Juan Suriray de la Rua v. Edward Jenkins*, February 28, 1776, SJR *LHQ* 11, no. 2 (1928): 340–52.

45. *Catherina v. Estate of Juan Bautista Destrehan*, 558–59.

46. Baade suggests that Gálvez's hostility stemmed from his ownership of slaves and his marriage into one of the colony's largest slave-owning families. Yet Unzaga had married into the same family and continued to support *coartación*. See Baade, "Law of Slavery," 64; Joseph G. Dawson III, ed., *The Louisiana Governors: From Iberville to Edwards* (Baton Rouge: Louisiana State University Press, 1990), 52–61.

47. "Louisiana Free Database."

48. Manumission of Ignez [Agnes], December 16, 1779, Acts of Andrés Almonester y Roxas, 1:33.

49. *María dit Mariquine v. Pedro Methode*, November 8, 1780, SJR *LHQ* 15, no. 1 (1932): 165–66. Methode may have been slow to act, since María petitioned the court the following June to have a copy of Gálvez's ruling sent to the commander at Pointe Coupée.

50. An Act to Regulate the Conditions and Forms of the Emancipation of Slaves, March 9, 1807, published in *A General Digest of the Acts of the Legislature of Louisiana: Passed from the Year 1804, to 1827, Inclusive, and in Force at This Last Period*, comp. L. Moreau-Lislet (New Orleans: Levy, 1828), 454–56.

51. "Louisiana Free Database."

South Carolina's Grand Jury Presentments

The Eighteenth-Century Experience

Sally E. Hadden

IN THE CONTEMPORARY WORLD, we have grown used to hearing about grand jury indictments. Between media scandals and procedural television programs such as *Law and Order* that follow the accused from arraignment to trial, individuals in our age are sometimes overly informed about indictments of public figures or fictional characters who have run afoul of the law. Indictments are the result of information provided to a grand jury, usually by the local prosecutor's office. The grand jurors (not to be confused with regular, or petit, jurors, who sit during an ordinary trial) are shown the amassed evidence of a possible crime, and the prosecutor asks the grand jurors to return a true bill, which allows the prosecutor to proceed to trial against the individual named in the indictment. The grand jury has the option of rejecting whatever evidence is presented and returning the bill "ignoramus"—without knowledge or assurance that the crime occurred as the prosecutor suggested. But an indictment is not a presentment, and indeed, most historians, let alone laypeople, have never heard of grand jury presentments. In the eighteenth and nineteenth centuries, however, grand jurors gathered and not only discussed the merits of possible indictments—which began with the prosecutor—but also raised complaints about individuals or practices within their community that they wanted to see changed. When grand jurors rather than prosecutors initiated the action, the resulting complaints were called presentments. Presentments, therefore, indicated faults, failings, and violations of both social norms and legal rules that grand jurors pointed out for others to see and hopefully to correct.[1]

Grand jurors were most often self-informing, bringing their own knowledge of wrongdoing in a community to their deliberations. However, grand

jurors were not the only ones who influenced the contents of presentments: judges routinely "charged" grand juries prior to their deliberations with considering the failings of specific people or laws, hoping that these charges would influence the grand jurors to present those failings.[2] Sometimes judges succeeded, but on other occasions, their words went unheeded. Judge John Faucheraud Grimké, justice of Charleston's Court of General Sessions in the 1780s, wanted a better jail. In lobbying the legislature for funds, he encouraged petitions, sent letters from jailors, copied the Charleston city council minutes about the topic, and prodded the grand jury to present the jail's inadequacies. Years passed before his suggestion was taken up.[3]

South Carolina's grand juries were not simply the mouthpiece for judges with an agenda for reform, however. This becomes most evident from an incident that occurred in 1793. In that year, the grand jury for Ninety-Six District presented a grievance against Judge Grimké for his apparent failure to do his judicial duty—the same Judge Grimké who had earlier supported the building of the Charleston jail. Grimké's decision to leave the court at Ninety-Six District while it was still in session to return home to Charleston offended the grand jurors. They used the presentment process to accuse him of malfeasance in failing to carry out his circuit duties. The remaining judge at Ninety-Six, John Rutledge, tried to persuade the jurors that Grimké had done nothing wrong, but the jurors could not be dissuaded from presenting Grimké's behavior to the state legislature. They felt his conduct was a "marked insult to the community."[4]

The grand jurors' decision to present Grimké forced both Rutledge and Grimké to defend his actions in lengthy documents to the state legislature. This would not have been necessary if the judges had not felt that the presentment would be taken seriously in the assembly and if Grimké's sense of honor had not been offended. Rutledge tried to persuade the jury to renounce the presentment: "I told the Jury, when they brought it in, that I could not avoid ordering it to be laid before the Legislature; but, that, I should do so, as I really do, with very great reluctance." Rutledge recorded that Grimké was not bound to work in Ninety-Six—the law did not demand it, and the job had been assigned to Rutledge alone—and that with only one courtroom, two judges could not conduct hearings simultaneously. Rutledge noted that he had conducted all the court business as quickly as any two judges could have done. Yet even while demonstrating that the grand jury was mistaken about the law, Grimké's lack of obligation, and Rutledge's abilities to dispatch court matters, Rutledge took care not to dismiss the

opinions of the grand jury as inconsequential. "Altho I am persuaded, that the Jury were actuated, by the most pure & honorable Motives, I conceive, with great Deference, to that Respectable Body, their opinions [are] erroneous, & their Presentment not well founded." Nonetheless, Rutledge would not allow the grand jury to accuse him of malfeasance by refusing to convey their presentment to the proper authorities: he sent their complaint about Grimké to the state assembly despite his qualms.[5]

Grimké based his defense of his own conduct on the changes in the law wrought by the revolution. Although "royal judges" went on circuit duty in pairs, after the revolution, state law allowed judges to work alone. Recounting the changes in the law in 1778, 1782, 1789, 1790, 1791, and 1792 (including section-by-section quotations), Grimké defended himself for almost ten pages. Citing his length of service and previous willingness to carry out circuit duties in the preceding fifteen years, Grimké gave his other two reasons for leaving Ninety-Six before all court dockets had been cleared: the sudden change to cold weather left his family in the backcountry without winter clothing, and the alteration of the district lines reduced it to one-third its previous size (thus reducing its court business).[6] With other pressing duties, Grimké left Rutledge to handle the few remaining cases in Ninety-Six District without him, thereby incurring the wrath of the grand jurors, who felt slighted by his departure and who flailed him publicly before the state legislature with their presentment.

Grimké's determination to defend himself and Rutledge's ardent defense of his colleague suggest that the grand jury's words carried weight in South Carolina. As the recipients of complaints from their own members, from judges, from constables, and even from private individuals, who could forward their concerns to grand jury members verbally or in writing, the grand jury thus functioned in the colonial and early national era as a communal sounding board.[7] Grand jurors heard rumors, innuendo, gossip, and unsubstantiated lies, and they bore responsibility for sorting out truth from falsehood before making their presentments. These presentments, then, represent what several groups—judges, jurors, and ordinary citizens—thought their society needed to implement immediately or avoid or abstain from, statements about what ought to be done or not done to create a better community in the eighteenth century.

Although the grand jury operated in secrecy, the creation of this communal utopia was a very public process, not merely after the presentments were delivered to the courtroom but also in newspapers. For forty years

before the revolution, grand jury presentments were front-page news. In an era when foreign news dominated the front pages of colonial newspapers, few local items appeared immediately beneath newspaper mastheads; presentments, however, almost always were on page 1, particularly in the *South Carolina Gazette*.[8] Indeed, the first issue of the *Gazette* published after the repeal of the Stamp Act in June 1766—when the newspaper had not published for nearly seven months—had grand jury presentments on page 1.[9]

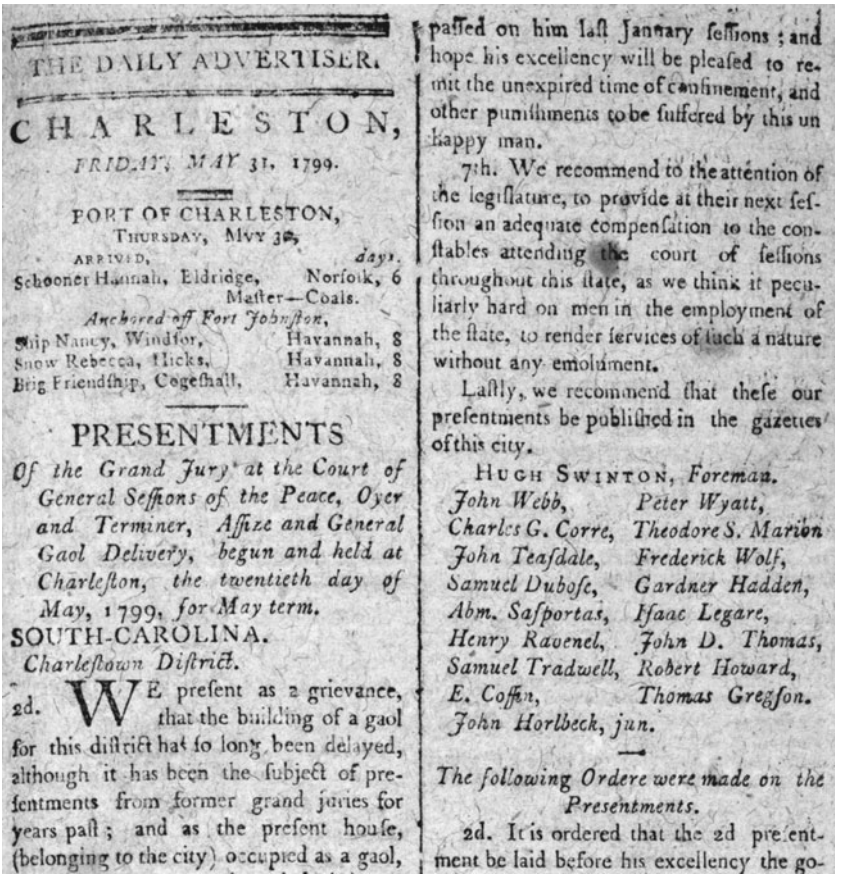
An exploration of eighteenth-century South Carolina grand jurors' complaints and, in particular, of what presentments were published in Charleston's newspapers makes for fascinating reading. While some presentments were forwarded to the Commons House of Assembly and were reprinted in its legislative journals, the presentments that appeared on the pages of the *South Carolina Gazette*, the *Gazette and Country Journal*, and the *South Carolina and American General Gazette* offer a very public view of what grand jurors thought had gone wrong with their communities.[10] Not surprisingly, complaints changed over the course of the century, emphasizing different areas of social behavior that juries wanted to see altered, improved, or stopped entirely. Of course, newspapers as an evidentiary source are not without their problems; relatively few survive from the first quarter of the eighteenth century in South Carolina. Nonetheless, given the loss of most of South Carolina's court records prior to the 1760s, newspaper accounts of courtroom acts such as presentments furnish a glimpse of a world partially lost to us—the legal world of Carolinians in the eighteenth century.[11]

The earliest presentments to appear in newspapers, in the 1730s, 1740s, and 1750s, stressed four areas of concern that white grand jurors thought required immediate action: first and foremost, the cessation of slave behaviors they disliked (such as drinking, selling goods, hiring their own time, gathering on the Sabbath for gambling); second, the necessity of repairs to roads, bridges, and causeways; third, the need for a new public service or new public office, such as a jail, a workhouse, a scavenger, or officers of the market; or fourth, the demand that existing public services be better performed than they already were. A typical complaint about the roads from a 1734 grand jury reads, "We present as a Grievance, that the Roads and Bridges in *Christ-Church Parish* are neglected contrary to Law."[12] Colonial law required residents to provide a few days of public service per year to maintain or repair roads near their homes; in South Carolina, slave owners frequently sent their slaves to perform this local civic duty, but not everyone complied. After all, work done on roads was labor not performed on private property,

and some road work supervisors tried to turn a blind eye when their neighbors failed to meet their communal obligations as required. Complaints about the roads in Christ Church Parish were repeated on November 5, 1737, and May 1, 1756. Given human nature and the desire to skimp on civic repairs, perhaps it is not surprising that some grand jury complaints never went away: in 1768, another grand jury was still complaining about the roads in Christ Church Parish.[13] Similarly, grand jurors complained about the need for a better jail as late as May 31, 1799, more than a decade after Judge Grimké began urging authorities to replace it (see figure 7).[14]

On occasion, the grand jury's complaints targeted specific individuals for illegal behavior or businesses that were considered dangerous, smelly, or sacrilegious. For example, in 1737, Thomas Howard was singled out for stealing a cow, and Edward Clark was publicly accused by grand jurors of selling goods in the marketplace using false measures.[15] Charleston's chandlers were cited several times for melting tallow in the confined spaces of the town—surely a fire hazard but also perhaps a putrid, foul nuisance to those living downwind during rendering time. Presentments occasionally indicated a lack of reverence or decorum in local enterprises: in 1742, town butchers were criticized for slaughtering their animals on Sundays.[16] Yet the number of presentments that focused on what we might call moral offenses was relatively minor except in one area.[17] By far, the most frequently criticized town businesses were liquor retailers and keepers of disorderly houses, which were thought to undermine both the good behavior of slaves (by encouraging thefts to pay for booze) and the morality of those enticed into gambling or prostitution.[18] Grand jury presentments about liquor sales in Charleston persisted from the 1730s to the 1790s.

Most of the presentments published prior to the 1760s contained at least two or three complaints about slave behavior that grand jurors wanted stopped: cursing, making excessive noise, "caballing" on the Sabbath, selling goods that were thought to be stolen, and being permitted to hire their own time without a master's supervision. No specific group of slaves was singled out, no individual called by name, although some presentments targeted country slaves rather than city slaves. But when tallied by individual grievance, the presentments against slave behaviors did not have the highest number of aggregate complaints: the poor condition of roads, bridges, and ferries in and around Charleston edged out slaves' "misbehaviors" on a numerical basis. Yet the overwhelming impression left by grand jury presentments printed in Charleston newspapers prior to 1760s is that grand



THE DAILY ADVERTISER.

CHARLESTON,

FRIDAY, MAY 31, 1799.

PORT OF CHARLESTON,
THURSDAY, MAY 30,

ARRIVED, days.

Schooner Hannah, Eldridge, Master—Norfolk, 6 Coals.

Anchored off Fort Johnston,

Ship Nancy, Windsor, Havannah, 8
Snow Rebecca, Hicks, Havannah, 8
Brig Friendship, Cogeshall, Havannah, 8

PRESENTMENTS

Of the Grand Jury at the Court of General Sessions of the Peace, Oyer and Terminer, Assize and General Gaol Delivery, begun and held at Charleston, the twentieth day of May, 1799, for May term.

SOUTH-CAROLINA.

Charlestown District.

2d. WE present as a grievance, that the building of a gaol for this district has so long been delayed, although it has been the subject of presentments from former grand juries for years past; and as the present house, (belonging to the city) occupied as a gaol, passed on him last January sessions; and hope his excellency will be pleased to remit the unexpired time of confinement, and other punishments to be suffered by this unhappy man.

7th. We recommend to the attention of the legislature, to provide at their next session an adequate compensation to the constables attending the court of sessions throughout this state, as we think it peculiarly hard on men in the employment of the state, to render services of such a nature without any emolument.

Lastly, we recommend that these our presentments be published in the gazettes of this city.

HUGH SWINTON, *Foreman.*

John Webb, *Peter Wyatt*,
Charles G. Corre, *Theodore S. Marion*
John Teasdale, *Frederick Wolf*,
Samuel Dubose, *Gardner Hadden*,
Abm. Sasportas, *Isaac Legare*,
Henry Ravenel, *John D. Thomas*,
Samuel Tradwell, *Robert Howard*,
E. Coffin, *Thomas Gregson*.
John Horlbeck, jun.

The following Ordere were made on the Presentments.

2d. It is ordered that the 2d presentment be laid before his excellency the go-

FIGURE 7. Grand jury presentments in the May 31, 1799, *South-Carolina State Gazette and Timothy's Daily Advertiser*. © American Antiquarian Society.

juries found slaves disorderly and in greater need of improvement than any road. In part, this impression results from the numbering and arrangement of the complaints as they were published; presentments prior to the 1760s typically placed slave-related offenses at the top of each list, with complaints about roads closer to the bottom. The ordering of presentments might reflect the priorities of grand juries, placing their most pressing complaints at the top of the heap, where they might garner the most notice and increased public support or speedier government action to remedy the problem.

That judges helped grand juries form their presentments is obvious in several ways: we know that judges charged the juries prior to their deliberations, and in a few instances, the charges given by judges directed grand juries to look into specific areas that jurists considered in need of attention.[19] Beginning in 1766, presentments were published complete with the court's orders following them, indicating what the judges thought should be done with the various presentments (number one should be forwarded to the legislature, number two should be forwarded to the church wardens, number three should be sent to the clerk of the market, and so on).[20] Judges even influenced the language used in some presentments. On occasion, the grand jury presentments about slaves were so specific that a judge or someone else extremely knowledgeable about the law must have helped shape the grand jurors' words. For example, in one set of presentments from 1744, the grand jurors complained that slaves were being sold liquor "in Defiance of the 32d paragraph" of the law governing slave behavior, were hiring their own time "in Defiance of the 33d paragraph," and were wearing finer apparel than was appropriate according to "the 40th Paragraph" of the law.[21] The grand jury may have received extremely precise directions on these matters from the judge prior to its deliberations (the court record and charge are missing), or the jurors may have consulted a printed copy of the relevant law before sending their presentments into the courtroom. Of course, grand jurors may have thought that specificity would increase the likelihood that an official would respond to their complaints. Pointing out particular laws needing enforcement and particular individuals needing correction was evidently considered part of a grand juror's job.

Naming names was part of the whole grand jury experience. Specific individuals were routinely singled out for having been derelict in their public duties or for having violated moral taboos. In March 1734, a lawyer, "James Graeme, Esq.," was faulted for serving as both counselor and justice of the peace in the same cause—he certainly could not be both advocate and um-

pire in the same case.[22] Daniel Pepper was called out in 1768 for using the office of justice of the peace to extort money from ordinary people, though no further details were offered to substantiate the claim.[23] Artemas Elliott was cited for closing a public road and thus creating grave inconveniences to the public.[24] Naming the wrongdoer placed the offense before the whole community, in the local paper, in a public manner that would get people talking: grand jurors presented William Harvey "for building a necessary-house in his yard, in Tradd Street . . . without making a vault, or putting in a tub, but left open behind, and thereby very offensive to the family of George Saxby, Esquire, and others."[25] If the smell was not enough to attract public notice, the neighbor would make it everyone's business to know about the unsanitary privy erected just next door. The process of putting someone's name in the newspaper for a specific grievance—particularly Harvey and his unfinished outhouse—must have acted as a powerful shaming device, designed to get the attention of the offending individual and publicly push that person to stop the wrongful behavior. Ironically, that most common of all shaming devices known to New England, public stocks, seemed to be lacking in Charleston, South Carolina; grand jurors asked for a set of public stocks on more than one occasion in the 1770s.[26] Perhaps they hoped to return the town to an earlier era when wrongdoers could be shamed not only by grand juries and newspapers but also by being forced to endure the taunts of their neighbors in an even more humiliating fashion.

The names of wrongdoers were not the only ones published as part of grand jury presentments. When specific complaints were made, it was common for the grand jury to name the individual who brought the complaint in the same individual presentment item as the name of the miscreant.[27] In several instances, the complainer was one of Charleston's constables.[28] By naming the informant—the person who gave information about the wrongful behavior—grand jurors protected the monetary interests of those involved. In the years before the revolution, if the Crown prosecutor (the attorney appointed to prosecute royal causes) could make good in court a charge against an individual, it was common for the fine collected to be split between the court and the original informant. So by giving the names of informants when a presentment was made, the grand jury was making sure that any fine would be shared with the law-abiding subject or the constable who brought the matter to jurors' attention.[29]

When grand jury presentments appeared in Charleston's newspapers, the list of offenses and offenders was typically followed by the names of all

the grand jurors who had served in that court session.[30] Defaulting on grand jury service was relatively rare prior to the revolution, possibly because judges ordered the names of defaulters published in the newspaper as well: the number of defaulters usually hovered around three or four for each session, rarely rising unless there was a threat of epidemic, as in 1760.[31] Printing the names of grand jurors who subscribed to a particular set of presentments undoubtedly validated the list of complaints, making other persons realize that the presentments were representative of the views of people drawn from different levels of colonial society, from different occupations, or from different regions (although most grand jurors before 1750 were Charlestonians). The grand juror names are quite revealing; nearly a quarter of the grand jurors came from the upper crust of Carolina society.[32] With each presentment, the grand juror lists always included at least a name or two drawn from the who's-who of Charleston's blue bloods: Christopher Gadsden, Gabriel Manigault, the Porchers and Izards—all of these elites did their civic duty on the grand jury.[33] Of course, given that they were a means to vocalize community dissatisfaction about virtually everything, the grand jury even complained about who served on the grand jury. In November 1737, the jurors complained that Charleston residents were called too frequently to serve, because the jury lists were not revised every three years (according to law) to reflect new immigrants. In this same set of presentments, jurors also complained of jurors and justices of the peace who did not do their duties.[34]

While the grand jurors were drawn, in theory, from all freeholders of South Carolina society, the well-to-do frequently led the grand jurors in their deliberations. The foreman of the grand jury (the first one on the list, followed by the other names, which often appeared in alphabetical order) was typically a Porcher, Izard, Manigault, or Gadsden. One hint at the sensibilities of the well-off comes from their early desire to have a public jail—the presentments of several grand juries complained that poor, honest (and sometimes not so honest) debtors were unfortunately lodged with criminals, black and white, because there were no separate facilities for these different kinds of lawbreakers. Men who were hard up for funds, either deliberately or through misfortune, ended up in jail for debt, but Charleston grand jurors believed they should not have to mingle with common criminals.[35] Another hint that the high-born convinced other grand jurors to follow their lead comes from presentments directed to the attention of the colonial assembly, calling for new laws, or urging that laws be revised. For example, one presentment complained that the legislature had erred in passing a new law that

set election qualifications too low; grand jurors in 1742 asked that election qualifications be raised to require greater wealth.[36] That constables urged grand juries to make specific charges is clear from two or three examples. In 1744, at the end of a long list of twenty-four presentments, the grand jury had clearly run out of steam (or possibly ink), and for its twenty-third presentment simply noted "the several matters presented by the several Constables, laid before us."[37] But the well-to-do did not always rule the grand jurors' deliberations: by the 1760s, greater heed was being paid to the complaints of residents in the backcountry, complaints about which few Charleston patricians would likely have worried. In a 1766 presentment, the grand jury noted that it was a great hardship to summon constables from the backcountry to Charleston.[38]

The presentments of the grand jury did not always meet with unqualified success. When grand jurors in 1734 pressed for a workhouse, one was financed and built by 1738, but when they asked for a jail or a scavenger to clean and repair Charleston's roads, their concerns went unheeded for years.[39] Complaints about a public jail were repeated from 1734 to 1756 and then were replaced by presentments saying that grand jurors thought a better public jail was needed.[40] Similarly, when grand jurors urged action for a printed set of the colony's laws, they repeated their complaints for nearly five years before the legislature authorized a new digest of legislation.[41] Jurors' efforts at times yielded concrete results: when grand jurors complained that too many liquor retailers had been given licenses within Charleston, fewer licenses were granted the following year.[42] The grand jury's ongoing campaign during the 1760s to erect street lamps in Charleston led to the eventual installation of city lights. Soon thereafter, however, someone vandalized the streetlights, prompting the grand jury to suggest passage of a law that would allow them to prosecute individuals who damaged street lamps.[43]

In the 1760s and 1770s, grand jurors' concerns shifted slightly. Although presentments about slaves and their behaviors never entirely disappeared, they became less prominent. Grand jurors from the 1730s to the 1750s listed their complaints about slaves hiring their own time, selling goods in the streets, or rioting on Sundays in the first three or four presentments of every list compiled. Complaints about slaves typically occupied at least the first two or three spots on any presentment list before midcentury. But by the 1760s and 1770s, concerns about slaves and the need to control their every action had begun to recede, or at least grand jurors perceived other prob-

lems as more pressing. Presentments about slave-related issues slipped from the top of each presentment list to the middle or the bottom; in one instance after midcentury, the list contained no complaints at all about slaves.[44] As concerns about slavery declined, which complaints then became more common?

Grand jurors of the 1760s and 1770s began pressing for increased services in South Carolina's backcountry, especially the establishment of schools, churches, and courts.[45] Complaints about the backcountry reflected its growing power and influence, and it would gain greater representation in the assembly after the revolution. Just as they had considered it a hardship to summon constables all the way to Charleston, grand jurors from the backcountry desired separate courts so that they too would not have to travel so far. Grand jurors were still theoretically being summoned to Charleston from all over the province, since there was only one grand jury for the whole colony until 1772.[46] The grand jurors' complaints mirrored those of the Regulators, the South Carolina vigilantes who in the 1760s violently and forcefully disrupted patriarchal lowcountry control of politics by demanding increased government services throughout the backcountry. One of their fundamental demands was for courts that would meet away from Charleston.[47] Charleston grand jurors agreed with the Regulators that courts within the colony should be divided and began asking for circuit or county courts in the 1760s. In 1769, the colony created circuit courts that spanned both Charleston and the backcountry.[48] This help for the backcountry would theoretically redound to the benefit of Charlestonians—when grand jurors spoke of helping the poor in the backcountry, it was not pure philanthropy; any efforts taken in the hinterlands might slow the flood of indigents coming to Charleston.[49] In June 1765, the grand jurors asked for a new poorhouse "for the reception of the number of poor objects who flock from all parts of the province to Charles-Town," and they repeated this complaint in 1767, saying that "by far the greater part of the poor of this province, and many from the adjacent provinces, have, for those many years past, centered in Charles-Town, to the great prejudice and expence of the inhabitants of said town."[50]

As historian Walter Fraser has described, Charleston found itself floundering in a sea of poor people—Acadians transported from Nova Scotia in the 1750s, widows and orphans left behind by the Seven Years' War, and artisans or laborers thrown out of work by a new wave of colonial legislation, like the Stamp Act and Townshend Acts.[51] When requests for poor relief escalated, taxes on Charleston's residents increased. Grand jurors worried

about the increasing numbers of the poor, theoretically as well as economically; they experienced sharp rises in taxes to support the poor (a nearly 700 percent increase in the twenty years prior to the revolution) and feared that the higher rates might drive them to financial ruin. In 1768, the colonial assembly finally authorized the building of a new poorhouse, but the grand jurors continued to grumble about the poor.[52] The growing numbers of poor individuals making their way to Charleston became a recurrent lament in presentments of the 1760s and 1770s, rivaled only in number and ferocity by the number of presentments about roads.

Grand jurors complained about inadequate roads, unrepaired bridges, and silt-filled causeways in large part because at least a few men on each grand jury would have had to travel to Charleston using the rutted routes that served as South Carolina's primitive highways.[53] In one particularly vibrant set of presentments issued in May 1770, grand jurors included only four items, with the first and last addressing roads and their users. The first complaint targeted owners of "loaded Waggons, with narrow Wheels," who insisted on using the high roads, which led to the roads being "cut up and destroyed." Grand jurors wanted a law that would enforce the use of broad wheels on wagons. The fourth complaint cited the narrowness of a specific road, which grand jurors thought led to delay and even danger to travelers.[54] The following year, grand jurors noted "the extreme bad Condition of the public Roads throughout the Province," singling out "the new Road leading from Colonel Gaillard's to Samuel Rigg's." Their memory of previous grand jury efforts was keen: they recommended "that the two first Presentments of the Grand Jurors for *January* 1770 . . . be properly attended to"; these earlier presentments had called for widening the roads and appointing public road surveyors with proper salaries, and the grand jurors of 1771 thought that those complaints and suggestions remained valid.[55]

By the 1770s, with the division of courts and grand juries among the various districts of South Carolina, grand jury presentments ceased to focus on Charleston (its slaves, its markets, its courts, streets, and other problems) and began to range more widely in listing the problems of a growing colony (and later state). At the same time, grand jury presentments were more frequently published in the Charleston newspapers. Where barely twenty sets of grievances had been published between 1734 and 1770, beginning in 1771, virtually all the various courts' grand jury presentments were included in the *South Carolina Gazette* and its rivals in the print trade. Twenty-two sets of presentments appeared in the newspaper from 1770 to the American Revo-

lution. Perhaps their numbers account for their displacement: beginning on February 7, 1771, presentments sometimes appeared in the back or middle pages of newspapers, particularly after the division of courts into districts scattered among Charleston, Cheraws, Georgetown, Camden, Beaufort, and Ninety-Six. From 1773 on, Charleston presentments remained page 1 news, while presentments from other districts were much more likely to be relegated to the back pages. Presentments from the various courts were often clustered together, side-by-side sets of complaints from near and far.[56]

Charleston residents could still read about the complaints and accusations from rural dwellers in Orangeburg, Camden, and Cheraws who now mourned *their* inadequate jails or tippling residents, echoing the complaints of Charleston residents forty years earlier.[57] Cheraws residents worried about the vagrants who roamed their neighborhoods; citizens of Camden and Ninety-Six lamented the need for tougher laws on horse theft.[58] Indeed, the complaints from the backcountry mirrored those from nearby Georgia, whose judges' charges to grand juries appeared in Charleston's papers. South Carolina's neighbors faced poor roads, an inadequate jail, and too many slaves with liquor.[59]

In part, the similarities between the two sets of complaints reflect the region's changing demographic landscape. Where Charleston had once been the only hub, spokes, and wheel driving South Carolina's economic engine—a seaport of thirty-five hundred souls from which virtually all of its mighty cargos of rice were exported across the Atlantic in 1700—by the 1760s and 1770s, South Carolina's population was more scattered, having penetrated deeper into the upcountry and with greater numbers along all of its many rivers, not just Charleston's Ashley and Cooper. The people in far-flung hamlets were often making do with very few civic services; a remote crossroads store might double as jail, mustering station, and meetinghouse, just as Charleston's few public buildings had done earlier in the century. Backcountry grand jurors had more in common with an earlier, smaller Charleston than with the metropolis Charleston had become (nearly twelve thousand residents in the early 1770s).[60] Backcountry grand jurors complained about horse theft and vagrants because their towns had not yet reached the size to have city markets, sewers, and street lamps, as Charleston did.

The splintering of concerns among grand juries did not mean that Charleston did not share some difficulties with people in the backcountry. In Charleston as elsewhere, individuals complained about poor roads and

bridges well into the 1770s and 1780s.[61] A February 1786 grand jury asserted that "many of the public roads in this district are in very bad repair" and that a few of them were even "impassable."[62] And concerns about slaves and their activities surfaced from time to time in presentments of the 1770s and 1780s across the colony: whites in each district could recall the effects of the Stono Rebellion and contemplate their vulnerability in a world where enslaved people constituted the majority. Charlestonians worried that other whites were "keeping Numbers of idle and useless slaves" in town and that they were "generally wanton, mischeivous and thievish"; Beaufort residents worried that Major Butler did not keep "a white person on his plantation near Bear-Creek." In 1774, Charlestonians went so far as to proclaim that their slaves had become "so obscene in their Language, so irregular and disorderly in their Conduct, and so superfluous in their Numbers we think it calls for the immediate Attention of the Legislature."[63] The lack of attention from the colonial assembly sparked Charleston grand jurors to press for more extreme measures in the grand jury presentments in the mid-1770s.

Despite their areas of common complaints—roads and slaves—urbanization and population growth meant that Charlestonians complained about problems that their more countrified cousins would not anticipate for many decades: the need for more and better lamps, wells, and drains; the need to establish a regulated fish market; the dangers of clogged chimneys that could set the whole town afire. Charlestonians began to urge a sweeping new solution to their problems that would not apply to outlying areas for years to come. The solution to many of these ills, which grand jurors in Charleston increasingly urged in the 1770s, was for the colonial government to permit incorporation.[64] The power for a city to make its own bylaws and regulations, create new town positions (like scavenger or fish market officer), and set its own penalties for violations would free it from the colonial assembly's sometimes lax oversight. However, incorporation would not come until 1783.[65]

Even thereafter, Charlestonians continued to worry about their jail, billiard halls, and excessive liquor consumption. In 1786, the grand jurors presented "as a great grievance" the number of gaming and tippling houses in the city; later that year, a different grand jury complained about the city prison as a "nuisance," overcrowded and exceedingly insecure. The Charleston sheriff told the court that prisoners could readily escape because they could receive files and chisels from the room above the jail (presumably through gaps in the wooden floorboards).[66] Even incorporation could not

solve all of an urban center's problems. The danger from fire remained a constant through the eighteenth century and into the nineteenth. With an insufficient number of "public ladders," grand jurors in 1788 worried that the town would be set ablaze by stopped chimneys, and they had reason to worry: Charleston had survived major fires in 1740 and 1778, each of which destroyed 250 businesses and houses.[67] These problems would continue to plague Charlestonians.

Though the problems persisted, the publication of presentments did not. With a few exceptions, grand jury presentments stopped appearing in Charleston newspapers in the 1790s.[68] Why they disappeared out of the newspaper pages is difficult to determine, for the absence of information could be attributed to virtually any cause. But a clue exists in an April 1799 grand jury charge that was published. Judge Walton was not a Carolinian, but he lived in nearby Georgia, and he had some impassioned words for the grand jurors in his courtroom. Political feuds of a national sort had been raging since the early 1790s, and grand juries had been dragged into the fray on one side or the other. Walton claimed that "grand juries of this state [have] been made, more or less, *the degraded instruments of political faction*." What Walton called "that party spirit" doubtless described the heightened conflict between Federalists and Democratic-Republicans, which had grown even more acrimonious in the wake of President John Adams's Alien and Sedition Acts and Thomas Jefferson's 1798 Kentucky Resolution. The consequences of this battling had trickled down to the local level, or so Judge Walton believed, labeling it the "disgrace and the scourge of this country," a blight for "several years past" that had finally gotten "within the tribunals of law and justices" and even into grand jury presentments.[69] Another hint that grand juries had sunk into factional behavior can be found in the report of a Louisville, Kentucky, grand jury that asserted that "the character of grand juries should be above supporting the sinking popularity of any mischevious influence"—a direct implication that some grand juries were thought to have declined into political activism. And in Virginia, the federal grand jury in this period appears also to have become a creature of political partisanship, if its critics can be believed.[70] If these assessments were correct, newspapers may have stopped reporting grand jury presentments to stifle more overt displays of grand jury partisanship. Alternatively, a partisan newspaper editor may have decided not to let his paper broadcast the views of an opposition-minded grand jury. Whatever the reason or

reasons, grand jury presentments gradually disappeared from Charleston's newspapers by the century's end.[71]

* * *

What are we to make of these presentments, so often repeated and just as regularly ignored by those responsible in the colonial assembly, the governor's office, and elsewhere? Why didn't Charleston's jail become stronger or Carolina's roads receive better maintenance? We might conclude from this century's worth of quite public complaining that white South Carolinians enjoyed shouting into the whirlwind, making ever-longer lists of the things that disturbed their sense of what should be. In a pessimistic vein, we might consider these presentments to be jeremiads spoken by a whole range of ordinary people who wanted to register their dissatisfaction about wrongdoing within their communities (comparable to the Puritan ministers who complained at length, as Perry Miller and Sacvan Bercovitch have shown in their studies of seventeenth-century New England).[72] In that sense, the presentments are part of a larger "culture of complaint" that comprised American jeremiads more generally. Or we might see these presentments as a reflection of the growing refinement of eighteenth-century colonial society in much the same light as Richard L. Bushman has suggested about the material culture of that time. Elite inhabitants, increasingly aware of the shortcomings of living in rusticated America, began complaining at the top of their lungs to show that they knew the difference between a "polite and civilized" society and one in which cows were fed in the city streets.[73] Perhaps the presentments about ongoing legal violations by slaves, followed by renewed legislation that went unenforced, merely "placated white resentment" and permitted law to remain unsullied by day-to-day illegalities, as one historian has suggested.[74]

In any case, the presentments helped create a popular legal culture in early Charleston outside the four walls of the courtroom, and this culture persisted even after court day had officially passed. Newspapers published only two or three times weekly lingered longer in homes, in taverns, and in offices, read and reread many times, in contrast to today's culture of disposable newsprint and Internet here today, gone tomorrow factoids. Containing important information about legal proceedings, public declarations about shameful misdeeds, and lists of roads to be avoided until repaired, published presentments had great value to early American residents, providing them with gossip, giving them input into the lawmaking process, or

simply letting elites show others how they would run the world. Historians need to make greater use of legal source material found in newspapers and sometimes found only in newspapers.[75] Residents of Charleston certainly did so in the eighteenth century, relying on the grand jury to voice their complaints and urge improvements to their community. As long as coffeehouses and public taverns had newspapers and individuals to read them, either silently or aloud, the offenses—and the names of the offenders—could become common parlance among Charleston's wealthy, illiterate, poor, and even enslaved.

NOTES

I acknowledge my particular gratitude to Alex Moore of University of South Carolina Press. When I first visited the state archives in Columbia, Alex was kind enough to alert me to the valuable information in presentments. This work is indebted to his generosity.

1. Historians generally have not focused exclusively on grand jury presentments but rather have used them in a passing sense to support arguments on other topics. See, e.g., the use of presentments in studies of South Carolina by M. Eugene Sirmans, *Colonial South Carolina: A Political History, 1663–1763* (Chapel Hill: University of North Carolina Press, 1966); Peter Wood, *Black Majority: Negroes in Colonial South Carolina from 1670 through the Stono Rebellion* (New York: Knopf, 1974); Philip D. Morgan, *Slave Counterpoint: Black Culture in the Eighteenth-Century Chesapeake and Lowcountry* (Chapel Hill: University of North Carolina Press, 1998). Among the few who have explored presentments in some depth, foremost are Richard Younger, *The People's Panel: The Grand Jury in the United States, 1634–1941* (Providence, R.I.: American History Research Center, Brown University Press, 1963); and Gwenda Morgan, *The Hegemony of the Law: Richmond County, Virginia, 1692–1776* (New York: Garland, 1989). Younger devoted about fifty pages to discussing the work of grand juries in all the colonies and states prior to 1800, while Morgan focused on a single county within Virginia.

2. L. Lynn Hogue, "An Edition of 'Eight Charges Delivered, at So Many Several General Sessions, & Gaol Deliveries: Held at Charles Town . . . in the Years 1703, 1704, 1705, 1706, 1707 . . . by Nicholas Trott, Esq: Chief Justice'" (PhD diss., University of Tennessee, 1972). See also L. Lynn Hogue, "Nicholas Trott: Man of Letters," *South Carolina Historical Magazine* 76, no. 1 (1975): 26–27. On the thanks of a grand jury to the judge for his instructive charges, see *South Carolina Gazette*, January 16, May 12, 1777 (both in Beaufort District).

3. See John Faucheraud Grimké to Thomas Pinckney, April 6, 1787, Petitions to the General Assembly, South Carolina Archives and History Center, Columbia.

4. John Rutledge to Governor William Moultrie, December 9, 1793, in ibid.

5. Ibid.

6. John Faucheraud Grimké to President of the Senate, 1793, in ibid.

7. On one occasion, constables published their own list of presentments with highly specific accusations about tippling houses, disorderly houses, and fire hazards. See *South Carolina Gazette*, April 3, 1742. That the grand jury's presentments had been published

only the week before (*South Carolina Gazette*, March 27, 1742) suggests three possibilities: (1) the constables had delivered their complaints but the grand jury ignored them; (2) the grand jury heeded them but the printer did not print them with the other presentments; or (3) the constables never delivered their complaints. In any case, the constables may have wished to have their complaints registered so that they could collect the informant share of any fine won by the royal attorney.

8. The only presentments I discovered that did not appear on the front page of the *South Carolina Gazette* prior to 1770 were November 8, 1742, and April 3, 1762. Other newspapers, including the *South Carolina Gazette and Country Journal*, *South Carolina and American General Gazette*, and the *Gazette of the State of South Carolina*, frequently printed presentments on page 2 rather than page 1.

9. *South Carolina Gazette*, June 2, 1766.

10. These findings contrast nicely with the information on grand juries that appears in A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680–1810* (Chapel Hill: University of North Carolina Press, 1981), 179–85.

11. On the judiciary in South Carolina generally, see Hoyt P. Canady, "Gentlemen of the Bar: Lawyers in Colonial South Carolina" (PhD diss., University of Tennessee, 1979); Rayford B. Taylor, "The South Carolina Judiciary, 1669–1769" (PhD diss., University of Georgia, 1978); John E. Douglass, "The Creation of South Carolina's Legal System, 1670–1731" (PhD diss., University of Missouri at Columbia, 1984).

12. *South Carolina Gazette*, March 30, 1734.

13. Ibid., May 9, 1768.

14. *South-Carolina State Gazette and Timothy's Daily Advertiser*, May 31, 1799.

15. *South Carolina Gazette*, November 5, 1737.

16. Ibid., March 30, 1734 (chandlers), November 8, 1742 (butchers).

17. This provides a contrast to seventeenth-century charges to the grand jury, which included a large amount of biblical material, and the resulting presentments, which naturally focused on morality offenses to a greater degree. See George L. Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (Lanham, Md.: University Press of America, 1960), 140–41.

18. *South Carolina Gazette*, May 1, 1756.

19. Ibid., November 8, 1742 (charge to jury), October 16, 1749 (an article that anticipates an upcoming court session in which judges will charge juries).

20. Ibid., June 2, 1766.

21. Ibid., November 5, 1744.

22. Ibid., March 30, 1734.

23. Ibid., February 1, 1768; for complaints about Edward Musgrove and Thomas Bond, justices of the peace, see May 9, 1768.

24. Ibid., May 1, 1756.

25. Ibid., May 9, 1768.

26. Ibid., January 25, 1770, February 7, 1771.

27. Ibid., May 1, 1756.

28. See, e.g., ibid., June 2, 1766.

29. For examples giving both the name of the offender and informant, see ibid., February 1, May 9, 1768, May 3, 1770.

30. See, e.g., ibid., March 30, 1734, March 27, 1742, March 28, 1743, March 30, 1747, May 1, 1756.

31. See ibid., March 29, 1760; for defaulter lists, see April 7, 1749, April 13, 1752, April 13, 1767, January 26, 1769, January 18, 1770. On the much greater rates of default in the 1790s, see John A. Hall, "That Onerous Task: Jury Service in South Carolina during the Early 1790s," *South Carolina Historical Magazine* 87, no. 1 (1986): 1–13.

32. See Walter Fraser, "Controlling the Poor in Colonial Charles Town," *Proceedings of the South Carolina Historical Association* (1980): 13–30.

33. Manigault was foreman in January 1771. See *South Carolina Gazette*, February 7, 1771. For a similar pattern in Virginia's federal grand juries of the 1790s, see Brent Tarter and Wythe Holt, "The Apparent Political Selection of Federal Grand Juries in Virginia, 1789–1809," *American Journal of Legal History* 49, no. 3 (2007): 263–64.

34. *South Carolina Gazette*, November 5, 1737.

35. Ibid., March 30, 1734, November 5, 1737.

36. Ibid., November 5, 1744.

37. Ibid..

38. Ibid., June 2, 1766.

39. Walter Fraser, *Charleston! Charleston! The History of a Southern City* (Columbia: University of South Carolina Press, 1989), 57. The vestry of St. Philip's Church took the lead in raising funds and supervising the workhouse's construction.

40. For the workhouse see *South Carolina Gazette*, March 30, 1734; for the jail, see March 30, 1734, November 5, 1737, March 27, 1742, April 15, 1745; for the better jail, see May 1, 1756; for the scavenger, see March 30, 1734, November 5, 1744.

41. Ibid., June 8, 1765, June 2, 1766, November 17, 1767, February 1, 1768.

42. Ibid., November 5, 1737, November 11, 1744.

43. Ibid., November 9, 1767, February 1, 1768, January 25, 1770, February 7, 1771 (on law regarding damaged street lamps).

44. See, e.g., ibid., June 8, 1765, June 2, 1766, November 9, 1767, January 25, 1770, February 7, 1771; for a set of presentments in which slaves are unmentioned, see May 3, 1770; for an unusual presentment that highlighted slave huckstering, see April 3, 1762 (a single presentment citing this particular slave behavior; the court did not publish the rest of the presentments from that grand jury).

45. For schools, see ibid., June 8, 1765, November 9, 1767, February 1, 1768, May 9, 1768, January 25, 1770; for churches, see May 9, 1768; for courts, see November 12, 1764, June 2, 1766, November 9, 1767. See generally Rachel Klein, *Unification of a Slave State: The Rise of the Planter Class in the South Carolina Backcountry, 1760–1808* (Chapel Hill: University of North Carolina Press, 1990).

46. Complaints about the reuse of old jury lists surfaced again in the *South Carolina Gazette*, November 12, 1764; for complaints about the jury room in the courthouse in Charleston, see June 8, 1765. Although a 1769 law permitted the division of justice into several circuit courts, the act was not to be put into effect until jails and courthouses were built in the new districts; the law consequently did not take effect until 1772. See Jerome J. Nadelhaft, *The Disorders of War: The Revolution in South Carolina* (Orono: University of Maine at Orono Press, 1981), 18–19.

47. Richard Maxwell Brown, *The South Carolina Regulators* (Cambridge: Harvard University Press, 1963).

48. *South Carolina Gazette*, June 2, 1766, November 17, 1767. On an early failed experiment to expand South Carolina's court system, see John E. Douglass, "Judiciary without Jurisdiction: South Carolina's Experiment with a County and Precinct Court System,

1720–1730," *South Carolina Historical Magazine* 90, no. 3 (1989): 237–56. For a copy of the 1769 circuit court act, see Brown, *South Carolina Regulators*, 155.

49. *South Carolina Gazette*, June 8, 1765, November 9, 1767, February 1, 1768, February 7, 1771. On the rising number of urban poor in colonial America, see generally Gary Nash, *The Urban Crucible: Social Change, Political Consciousness, and the Origins of the American Revolution* (Cambridge: Harvard University Press, 1968).

50. *South Carolina Gazette*, June 8, 1765; *South Carolina Gazette and Country Journal*, November 17, 1767.

51. Fraser, *Charleston! Charleston!*, 98–107. Fraser's other work on the impoverished includes "The City Elite, 'Disorder,' and the Poor Children of Pre-Revolutionary Charleston," *South Carolina Historical Magazine* 84, no. 3 (1983): 167–79.

52. Thomas Cooper and David J. McCord, eds., *The Statutes at Large of South Carolina* (Columbia: Johnston, 1836–41), 7:90–92.

53. In an unusual published presentment that included only two specific presentments out of at least fifteen, see complaints 4 and 15 about a bridge in Craven County and the road between Saltcatcher Ferry and Fishpond Bridge, *South Carolina Gazette*, September 18, 1762; a similarly excerpted set of presentments, which included only the ninth through twelfth items, focused on roads and bridges only (*South Carolina Gazette*, November 13, 1762).

54. *South Carolina Gazette*, May 3, 1770.

55. Ibid., February 7, 1771.

56. Ibid., May 31, 1773 (Camden, Cheraws, Georgetown), December 27, 1773 (Camden and Cheraws), January 17, 1774 (Beaufort and Ninety-Six), June 3, 1774 (Cheraws and Georgetown), June 3, 1774 (Charleston and Camden).

57. For jails, see ibid., November 26, 1772 (Orangeburg), May 31, 1773 (Camden), May 31, 1773 (Cheraws); for tippling, see November 26, 1772 (Orangeburg), May 31, 1773 (Georgetown), June 13, 1775 (Beaufort).

58. Ibid., May 31, December 27, 1773 (Cheraws), December 27, 1773 (Camden), January 17, 1774 (Ninety-Six).

59. *South-Carolina Gazette and General Advertiser*, November 9, 1784 (Savannah); *Columbian Herald (New Daily Advertiser)*, November 4, 1796 (Savannah). The *Charleston City Gazette*, March 30, 1795, reprinted a rather spectacular presentment from Effingham County, Georgia, in which grand jurors complained about the Yazoo land fraud. On the Yazoo affair, see http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-663 (accessed August 30, 2011).

60. Fraser, *Charleston! Charleston!*, 25, 135.

61. *South Carolina Gazette*, February 22, 1773, February 28, 1774, October 31, 1774 (Charleston), May 31, 1773, June 3, 1774 (Camden), May 31, 1773 (Orangeburg), December 27, 1773 (Cheraws), June 3, 1774 (Georgetown), May 12, 1777 (Beaufort).

62. *Charleston Evening Gazette*, February 23, 1786.

63. *South Carolina Gazette*, October 25, 1773, October 31, 1774 (Charleston), January 17, 1774 (Beaufort).

64. Ibid., October 29, 1772, February 22, 1773, February 28, 1774; for incorporation, see February 22, 1773, October 25, 1773. Two presentments were quashed by the court, and only local records may reveal what the newspapers manage to obscure, but these complaints may have had revolutionary importance (February 28, 1774).

65. Fraser, *Charleston! Charleston!*, 169.

66. *Charleston Evening Gazette*, February 23, 1786; see also *South-Carolina State-Gazette*, May 31, 1799; *Charleston Morning Post*, October 17, 1786.

67. *Columbian Herald*, June 26, 1788; Fraser, *Charleston! Charleston!*, 67–69, 156–57.

68. For the exceptions, see *South-Carolina State-Gazette*, May 31, 1799 (Charleston), *Charleston City Gazette*, June 14, 1799 (Ninety-Six), *South-Carolina State-Gazette*, October 8, 1799 (Charleston).

69. *Charleston City Gazette*, April 3, 1799.

70. Tarter and Holt, "Apparent Political Selection," 257–83.

71. *Charleston City Gazette*, April 23, 1799.

72. Perry Miller, *Errand into the Wilderness* (Cambridge: Harvard University Press, 1958); Perry Miller, *The New England Mind: From Colony to Province* (Cambridge: Harvard University Press, 1953); Sacvan Bercovitch, *The American Jeremiad* (Madison: University of Wisconsin Press, 1978).

73. See Richard L. Bushman, *The Refinement of America: Persons, Houses, Cities* (New York: Knopf, 1992). On cows and horses being fed in Charleston streets, see the presentment in *South Carolina Gazette*, October 29, 1772.

74. Robert Olwell, *Masters, Slaves, and Subjects: The Culture of Power in the South Carolina Low Country, 1740–1790* (Ithaca: Cornell University Press, 1998), 169–70.

75. For two scholars who have fully mined newspapers and periodicals for what they can tell us about legal events, see Karen Halttunen, *Murder Most Foul: The Killer and the American Gothic Imagination* (Cambridge: Harvard University Press, 2000); Hendrik Hartog, "Lawyering, Husbands' Rights, and 'The Unwritten Law' in Nineteenth-Century America," *Journal of American History* 84, no. 1 (1997): 67–96.

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Guarding Republican Liberty

St. George Tucker and Judging in Federal Virginia

Jessica K. Lowe

JUDGE ST. GEORGE TUCKER had just left the bench late in the evening of September 3, 1791, when he scrawled a short message to attorney Charles Lee in the flickering candlelight. "In a cooler moment," he wrote, "it is not improbable you may be convinced that in my official conduct I have neither deserved the Imputation of partiality, nor of blood-thirstyness—if so," he continued, "I have a right to expect from your candor, an acknowledgement that those expressions which you this Evening made use of at the bar, and which in my interpretation of them may have a tendency to fix that stigma on my character, were either unmerited, or unintended."[1]

The previous hours had been heated. Judge Tucker was on circuit presiding over the state district court in Winchester, Virginia, and had just received a jury verdict in a controversial murder case. Lee, who was a member of the elite group of attorneys admitted to practice in Virginia's state courts, was representing defendant John Crane. Crane's jury had deliberated for almost forty hours before finally rendering a compromise "special" verdict that declined to reach a legal conclusion and instead gave a long account of the facts of the fight in which Crane had killed another man.[2] The verdict then left the question of what those facts meant legally—whether Crane was guilty of murder or manslaughter—up to Judge Tucker. "Upon the whole matter the jury pray the advice of the court," the verdict explained. "If the court should be of opinion that the prisoner is guilty of murder, then we of the jury do find the prisoner is guilty of murder; and if the court shall be of opinion that the prisoner is not guilty of murder, but guilty of manslaughter, then we the jury do find the prisoner not guilty of murder, but guilty of manslaughter."[3] That verdict had truly left Crane's fate hanging in the balance: a manslaughter conviction could qualify him for the benefit of clergy, but a murder conviction would mean death.

Judge Tucker was probably predisposed to be frustrated. Tucker disliked special verdicts, which, he wrote, gave judges "an influence in questions of fact which may become highly pernicious."[4] And he was not without reason. As legal historian John Langbein has noted with respect to the English context, "The effect [of special verdicts] was that the court preempted much of the jury's normal adjudicatory function."[5] Nonetheless, these verdicts were, Tucker complained, the "practice, constantly, in difficult cases" in Virginia.[6] During the trial, Tucker had tried to stay unentangled from the jury's decision—he had even declined to instruct the jury on the witnesses' testimony, instead allowing the jurors to reach their own conclusions.[7] But thanks to the special verdict, the case's key question was now in his lap.

Because the court would make its decision based on the special verdict's rendition of the facts, the verdict's contents were critical. Lee thought that the verdict omitted proven facts that worked in favor of his client—he suspected, he told Tucker, because the jury did not realize that these facts were material. He requested that Tucker allow him to point these omissions out to the jury and ask them to modify their findings. Tucker at first reluctantly agreed, but as he listened to Lee's arguments, the judge had second thoughts. He interrupted Lee, who responded harshly, telling Tucker that if he was so satisfied that the verdict was just, then "judgment of death might be pronounced."[8] The meaning of Lee's hyperbole was evident: the jury had, after all, left the legal consequences of the special verdict to the court and, Lee insinuated, Tucker's mind was already made up.

Perhaps shaken by Lee's rebuke, Tucker eventually declined to render a decision. He instead allowed Crane to take the case up to Virginia's General Court, which determined that Crane was guilty of murder and sent the case back to the district court, where a different bench ordered Crane's execution.[9] But Lee's words stuck with Tucker. His feelings, the judge told Lee, had "not been violated in an equal degree for many years."[10]

Why was Tucker so upset by his confrontation with Lee? Until recently, the context of the letters between Lee and Tucker was unknown; as a result, the disembodied nature of the heated exchange has left on some scholars the impression of an imperious Tucker who insisted on extreme deference.[11] But, recentering the letters in their wider context, this essay suggests a different explanation, one embedded in the rise of the republican judiciary in late eighteenth-century Virginia. If Tucker's career to 1791 had a theme, it was advocating a republican role for the judiciary. And Lee's in-

sinuations struck to the heart of this theme—to the heart of Tucker's conception of the republican judge.

Thinking about southern judges and lawyers, including Virginia ones, in the years between Independence and the Civil War tends to evoke the image of planters dabbling in law, defending a reactionary version of states' rights against an encroaching federal government. For example, according to one historian, nineteenth-century southern lawyers drew "their lessons from the Antifederalists" and "were forced to argue against change and progress." The legal traditions of New England, conversely, stood for the "legal science" synthesized by Blackstone's *Commentaries* and provided the basis for Chief Justice John Marshall's constitutional nationalism.[12]

But this characterization would have surprised St. George Tucker in 1791. Virginians such as Tucker considered themselves in the vanguard of thinking about republican law reform, even if the reforms did not always happen in practice. Ever since 1776, committees of the commonwealth's most important lawyers had worked to adapt the law to Virginia's new form of government.[13] This was a theoretical as well as a practical enterprise born, as Tucker later wrote, out of "the suggestions of political experiment" and "a desire to conform to the newly adopted principles of republican government."[14] At the time of *Commonwealth v. Crane*, Tucker was busy disseminating these changes; as the new professor of law and police at William and Mary, he was annotating Blackstone's *Commentaries* for his students, with an eye principally to Virginia but also to the American context generally. Tucker's adaptation of Blackstone was an example of what he preached in its text: the importance of systematizing and studying law—or, as he put it, legal "science"—for the protection of republican liberty.

But although Tucker liked to think of law as a science, judging was a messy business in Virginia in 1791. This was certainly true literally, as Tucker and other judges trudged around the state on their circuits to sit at district courts dispersed throughout Virginia's vast territory. But it was also the case jurisprudentially. On one hand, the commonwealth's laws and legal system were rapidly changing; Independence had brought new structures of power, new statutes, and new legal questions. On the other hand, many things had stayed the same, and Virginia's judges confronted the disjunction between these two realities every time they dealt with a common law case or precedent based on a British statute. Virginia's law, like its judges, was on the move—transitioning from the colonial to the republican, from the inherited to the created.[15]

In the process of examining, theorizing, and negotiating this transition, Virginia's judges began to explore possibilities for a new, republican judicial role. In a succession of cases during the 1780s and 1790s, the Virginia judiciary claimed the power to police the boundaries of the state constitution and thought carefully and publicly about how the law should be imposed in individual cases. The aim was clear: what was formerly arbitrary and monarchical would now be protective and republican. In this day-to-day working out of the meaning and nature of judging in a republic, the figure of the judge began to emerge, fitfully and paradoxically, as the guardian of republican liberty.

The Making of a Republican Judge

Although the names of other Virginians from the founding era are today more familiar, St. George Tucker was a formidable force in the early republican legal world. Tucker shaped generations of law and lawyers both directly, as a judge and professor, and indirectly, through his 1803 American edition of Blackstone's *Commentaries*—the most widely used American legal treatise of the early nineteenth century.[16] And although Tucker was a serious legal scholar, he was also much more—a political thinker and at times idealistic reformer, a vivid writer, an inventor and tinkerer, and a poet of some skill.

Originally from Bermuda, St. George Tucker was the youngest son of a prominent shipping family with deep ties to that colony's history and government. Although he had hoped to study at the Inns of Court, financial considerations forced Tucker to enroll at the College of William and Mary instead. In Virginia, St. George, noted for his "good sense, cheerfulness of disposition, and goodness of heart," quickly made friends with leading families.[17] In 1778, he married a charismatic widow, Frances Bland Randolph, and became firmly ensconced within Virginia's power structure, even as the revolution threw much of the commonwealth into turmoil.

A hardworking, astute man with a good eye for opportunities and the drive and flexibility to take advantage of them, St. George was well equipped to manage the many challenges of the revolutionary period. When Virginia's courts closed, Tucker parlayed his contacts in Bermuda and Virginia as well as his family's shipping expertise into a successful smuggling operation that supported the patriot cause. Upon his marriage, he relinquished his mercantile activities, embraced the traditional lifestyle of the Virginia

FIGURE 8. St. George Tucker. Courtesy of Tucker-Coleman Papers, Special Collections Resource Center, Swem Library, College of William and Mary, Williamsburg, Virginia.

planter, and served in the Virginia militia. After the war, as Tucker watched Virginia's many great planters succumb to debt, he increasingly felt that finding security in Virginia's economic future would require having a profession.[18] Facing this new reality and his own financial situation, Tucker resumed his law practice and despite its burdens threw himself into it with characteristic energy.

The Case of the Prisoners and Judicial Review

In 1782, Tucker made one of his first forays back into legal practice when he attended a session of the Court of Appeals and found himself involved in one of the hottest cases of the day, *The Case of the Prisoners*, also known as *Commonwealth v. Caton*.[19] Originally at the court only as an observer, Tucker scribbled some thoughts on the case for his friend William Nelson, who then suggested that Tucker deliver them to the court himself as amicus curiae.[20] What resulted was a passionate argument in favor of the court's power to nullify an act of the legislature—what we now call judicial review—and a thoughtful parsing of the judicial role.

Caton involved three prisoners convicted of giving aid to the British and condemned to death for treason and raised the issue of a conflict between the Virginia Constitution and the Virginia Treason Act. The Treason Act had stripped the governor of his traditional power of pardon and moved the ability to grant clemency to, in its words, the "General Assembly." Following this procedure, the convicted men had petitioned the General Assembly for

pardon; the House of Delegates had granted the pardon, but the Senate had refused to concur, making the pardon appear invalid.[21]

Virginia's constitution had, however, seemingly prescribed a different procedure. It gave the governor the power of pardon "except where . . . the law shall otherwise particularly direct; in which cases, no reprieve, or pardon shall be granted, but by resolve of the house of delegates." The constitution thus suggested that in cases where the law stripped the governor's pardon power, that power would be exercised instead by the House alone. Under this rubric, the prisoners' pardon by the House was valid.[22] The question for the court was whether, in light of this conflict, pardon by the House was sufficient to constitute clemency. Embedded within that problem was what Tucker (and others) referred to as the Grand Constitutional Question: if the Virginia Constitution and Treason Act were in conflict, what was the court to do?[23]

Tucker argued strongly in favor of the court's power to invalidate the Treason Act. After dispensing with preliminary issues, Tucker began his constitutional argument by framing the question as "whether the Judges have a right to decide on the validity or nullity of a positive Act of Assembly."[24] His answer was yes, and his explanation proceeded through a series of logical steps.

His first two points emphasized the proper role of the judicial branch. First, Tucker outlined the separation of powers laid down by Virginia's constitution, which established separate branches, including judicial and legislative ones, and specified that "neither exercise the powers properly belonging to the other." Second, he set forth that the judiciary alone had the power to interpret laws. "Now I hold it to be uncontrovertible," he asserted, "that the power properly belonging to the Judiciary Department is to explain the Laws of the Land as they apply to particular Cases." As a result, "when such Cases arise, the Interpretation of the Laws of the Land is in the *Judiciary alone*." Otherwise, if the legislature could apply its own acts, the divided powers of the constitution would be undermined; this "Spirit of our Constitution" was, Tucker explained, also "agreeable" to Montesquieu's concern that if the same man were to both make the law and to apply it, there would be no check on arbitrary laws.[25]

Having established the judiciary's supremacy over particular controversies, Tucker argued that the constitution trumped any conflicting statute. He first noted that the "judiciary alone . . . can decide what is or is not Law, and consequently . . . on the validity or nullity of different Laws contra-

dicting each other." In Britain, the general rule of construction was that a later statute conflicting with a former one operated to repeal the first one, but this, Tucker contended, could not apply where the former law was the constitution—the "Basis and Foundation of Government." This was because any act of the legislature contrary to the constitution, if allowed to stand, would in effect alter the government's very foundation, something that the legislature had no power to do. The constitution, after all, was established by a still higher authority than the legislature—the people. As a result, any act of the legislature contrary to the constitution must, Tucker insisted, be "null and void."[26]

Tucker here acknowledged that the history of constitutional construction went against his reasoning—after all, he explained, in Britain, "constitutional" documents such as the Magna Carta had been altered over time by acts of Parliament. But Virginia's constitution was different. Whereas the British constitution "partakes of the nature of their Common Law" and was "constructive," Virginia's was "express." Whereas the "British is traditional . . . ours on the Contrary was formed with all the solemnity of an original Compact between Citizens." This meant that whereas Parliament had the power to "interpret" and thus implicitly shape and reshape the British constitution, Virginia's assembly had no such power. Indeed, Virginia's constitution had been committed to writing and made public "to all its Citizens, who became parties thereto," precisely so that it "might not be misinterpreted."[27]

Working within this hierarchy of new legal texts, Tucker ended his argument for the principle of judicial review with a final, dramatic flourish. The inquiry before the court was to try every legislative enactment against a touchstone: if an act was "absolutely and irreconcilably contradictory to the Constitution, it cannot admit of a Doubt that such an act is absolutely null and void." Indeed, such an act would be void "ab Initio." These were the "fundamental principles of our Government of which the Judiciary Department is constituted the Guardian."[28]

To "Guard" the Constitution

Tucker's arguments for judicial review and his idea of the judge as a bulwark of liberty embodied and furthered an important shift in the republican conception of the judicial role. As leading historians of the period have noted, suspicion of judicial discretion was a significant aspect of the revolutionary mind-set. Historian Gordon Wood has explained that at the time of

the American Revolution, the colonists had a "profound fear of judicial independence and discretion" stemming from the experiences of the colonial period, when lay judges, little recording of colonial court decisions, and the intricacies of colonial legal systems meant that judges frequently innovated in their judicial role.[29] Legal historian Morton Horwitz has agreed that the revolutionary generation was suspicious of judges and particularly of judicial constructions of statutes.[30] As a result of these misgivings, many revolutionary leaders desired simple and clear statutes that could be easily put into practice.[31] As Thomas Jefferson wrote of criminal law at the beginning of Virginia's law reform, "Let mercy be the character of the law-giver, but let the judge be a mere machine." Decisions of "the judge, or of the executive power," Jefferson explained, would be the "eccentric impulses of whimsical, capricious designing men."[32] In this era, the legislature—the voice of the people—was for many the most trusted branch.

Although Tucker's arguments in *Caton* also emphasized a limited judiciary, in applying those limits he simultaneously elevated the judicial branch to be the constitution's "guardian." If, as Horwitz argues, the revolutionary generation was indeed most concerned with judicial construction of statutes, Tucker's argument contained a great irony: after all, he claimed for judges not just the construction of any statute but the sole construction of the *supreme* statute—at least with regard to particular cases. The limited nature of the judiciary, its subservience to the people and their constitution, thus led to extraordinary power: the power to strike down an act of the legislature.

Tucker's designation of the judiciary as the guardian of the constitution in particular cases was an important move. As legal scholar Larry Kramer has emphasized, in this era the predominant understanding of constitutions continued to be derived from Britain's "customary" constitution, under which the "people themselves" were seen as the constitution's main enforcers; the constitution's interpretation was not confined to any particular branch or office of government, including the judiciary.[33] But as Tucker's argument to the court in *Caton* demonstrates, the future judge and legal scholar was already thinking along different lines. Whereas Kramer argues that most new state constitutions were propounded merely as a "practical necessity" to fill the gap left by independence and continued to be conceived along the same lines as their English ancestor, Tucker saw them as fundamental change.[34] "No parallel can possibly be drawn," he insisted, "between the Constitution of

G[reat] B[ritain] and this Country." Virginia's constitution had been framed with the solemnity of "an Original Compact" and "committed to writing," with all the citizens as "parties thereto."[35] Tucker emphasized that the people were the supreme governor and through the constitution had established a limited government. In this new government, the judiciary was "constituted the Guardian."[36]

In this way, Tucker's judicial review was democratic—the protection of the people's sovereignty by the republican judge. The sovereign people had, in convention, entered into a constitutional compact; by enforcing their will, Tucker saw the courts not as disregarding the people's legislature in favor of the judiciary but rather as implicitly deferring to a legislature that was greater than the General Assembly—the assembly of citizens that had, in theory at least, set forth the constitution. Indeed, Tucker's position in *Caton* sought to uphold that popular power in two ways—first conceptually, by protecting the people's sovereign act as embodied in the Virginia Constitution, and second, by the factual consequences of his argument, which sought to vindicate the decision of the House of Delegates (the lower and more popular branch of the Virginia Assembly) to pardon the prisoners. In *Caton*, judicial review would vindicate, not squelch, the people and their sovereignty.

Tucker's use of the judiciary to protect the people also went one step further. He implicitly stressed that the constitution was law as well as a political document, one applicable in particular cases and controversies and for the protection of individuals. Tucker would continue to develop this theme: in his law lectures of the 1790s on the federal Constitution, for example, he told his students that if the new federal government "should exercise powers not warranted by the Constitution," an affected individual could seek the "Aid of the Judiciary department to which the Cognisance of the Case properly belongs."[37] (Conversely, where the unconstitutional action instead affected a state, and when "*Rights will be invaded by every Such Act*," Tucker turned to the state legislatures to "sound the alarm.")[38] By the time he prepared his edition of the *Commentaries* in 1802, Tucker was even more explicit: an unconstitutional act against an individual entailed "an undoubted right to redress, by application to the judicial Courts of the State, or of the United States according to the nature of the case."[39]

Tucker may have been at the forefront of the thinking of the time with his conception of the judiciary, but he was by no means alone. George Wythe's

Caton opinion set forth his willingness to exercise judicial review if necessary and also strongly asserted the judge as the guardian of republican government. Wythe wrote:

> I have heard of an english chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject, against the encroachments of the crown; and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely, it is equally mine, to protect one branch of the legislature, and, consequently, the whole community, against the usurpations of the other: and, whenever the proper occasion occurs, I shall feel the duty; and, fearlessly, perform it. . . . Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.[40]

This strong conception of the judge continued to appear in Virginia throughout the 1780s and 1790s. During the Virginia ratifying convention, John Marshall (who had likely been in the audience during Tucker's *Caton* argument),[41] contended that usurpations of the federal Constitution would be dealt with by the judicial branch. "If," he argued, federal lawmakers "were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard."[42] In subsequent years, both Tucker and Marshall worked to advance the principle. As a new judge in 1789, Tucker drafted an opinion in favor of judicial review in the case of *Commonwealth v. Eldridge*, but he seems never to have delivered it.[43] And by 1791, the time of Crane's case, fully formed judicial review in Virginia was imminent; two years later, it would emerge in *Kamper v. Hawkins*, written at the district court level by Tucker himself and argued by Marshall.[44]

Some scholars have suggested that in their acceptance of judicial review, Virginians may have been somewhat exceptional.[45] For example, legal scholar William Treanor points to the dominance of Virginia's gentry over both the legal profession and the legislature, which resulted in greater respect for lawyers and less friction between the bar and the assembly.[46] Historian A. G. Roeber's work on colonial Virginia lawyers suggests a similar explanation, one based on the adept ways in which those lawyers, traditionally conceived as (in the parlance of the time) a "court" interest, re-

positioned themselves as advocates for Independence and republican government.[47] But whether or not Virginia was exceptional, St. George Tucker came of age as a lawyer within its atmosphere, and it was within Virginia's legal culture—which he helped to form—that Tucker conceived of his judicial role.

Commonwealth v. Posey and Statutory Interpretation

But the law was, then as now, about more than constitutional cases. Even as Tucker and others argued that judges were to "guard" the fundamental principles of government, concerns about judicial interpretation did not go away. *Commonwealth v. Posey* (1788) illustrates how Virginians were grappling with the role of the judge in the ideologically fraught area of statutory interpretation and precedent. If the issue in *Caton* was protecting the republican form of government, here it was the meaning of republican judging in an individual case. And if *Caton* was about interpreting the constitution, *Posey* was about republican interpretation of the laws.

Like *Caton*, *Posey* was a sensational case. John Price Posey had managed the New Kent County properties of George Washington's stepson, John Parke Custis; Posey became a justice of the peace and a representative to the General Assembly. But after Custis's death, Washington fired Posey, accusing him of stealing from the estate. Around this time, Posey, whom Washington referred to as "that Superlative Villin," was also charged with misdemeanor fraud.[48] In the summer of 1787, Posey was arrested for assaulting the county sheriff and confined to the county jail. He escaped, and three days later, the jail and clerk's office caught fire. Posey, whose fall from grace was so complete that he was identified in his indictment as a "laborer," was arrested and charged with enticing two accomplices, in the words of one, to "burn the Damn'd prison down" and to set fire to the clerk's office.[49]

Virginia's criminal law was already a matter of controversy. In 1776, Virginia's reformers had attempted to overhaul the commonwealth's criminal law; the inherited law of England, with its heavy use of the death penalty, was considered to be "too Sanguinary," as Edmund Pendleton put it, "punishing too many crimes with death."[50] Virginia's revisers had prepared a draft bill that proposed wide-ranging reforms—abolishing the death penalty for everything except treason and murder, prescribing labor in the public works as the most common punishment, and eliminating the benefit of clergy. Particularly relevant for Posey, arson under this proposal would

have been punished by a mere five years' forced labor, not death. But the bill eventually failed (a result Madison attributed to the "rage against horse-stealers," whom the bill exempted from capital punishment).[51] As a result, the common law of crimes remained in force. In the meantime, cases such as *Posey* still came before the courts, governed by the old "bloody code."[52]

Posey was convicted of arson, a capital offense, by the General Court, and he appealed to the Court of Appeals. Frances Tucker wrote to her husband that she heard that Posey's lawyers "were handsomely paid for a defense," and she wondered if any of "Posey's guineas" had made their way to her husband's "pockets."[53] They had not, for Tucker had just been appointed to represent the commonwealth—to his "great mortification," he told Frances—at the Court of Appeals, because the commonwealth's attorney was indisposed.[54]

At the Court of Appeals, Posey's counsel, Andrew Ronald, who had also represented the prisoners in *Caton*, argued for more than a day and raised three issues, the most important of which was that Posey was entitled to the benefit of clergy.[55] English precedent had long held that clergy for arson had indeed been taken away by statute, but Ronald argued that the precedent—including an opinion by venerated English jurist Lord Coke—was wrong. He urged the court to review the statutes, complicated by centuries of repeals and reinstatements, de novo. After all, "the antiquity of the precedent was nothing compared with the letter of the statutes."[56] The question before the court thus involved both the reception of British precedent and the proper canons of judicial interpretation in the new nation.

"Don't you pity me," Tucker wrote to his wife while listening to the second day of Ronald's argument, "for being obliged to answer so long an argument, especially as I shall, I fear, not even gain honor by the Contest."[57] Even before receiving his letter, Frances had already heard from other sources that St. George "spoke in Posey's case for four hours." She teased, "I shall cease to wonder at your silences at home in future, for I think as loquacious as I am, it would last me for a month at least."[58]

Unlike *Caton*, where he sided with Ronald and blasted the British Constitution, in *Posey*, Tucker argued in favor of the English legal tradition. Arson, even the burning of buildings like the clerk's office and the jail, was, he argued, a felony at common law and one of the few offenses to which clergy was not extended.[59] Tucker then walked the court through the English statutes in force in Virginia that had taken away clergy from various crimes or restored it.[60] English precedent was correct, he told the court, in

its interpretation of these statutes: clergy was unavailable. The majority of the Court of Appeals agreed. Posey was condemned to death.

The explicit question at hand was about arson and benefit of clergy, but a deeper issue was also at stake: what did it mean for a judge to interpret law in a republic? And, more particularly, what role did British precedent play? These questions emerged explicitly in the court's opinions. Judge Henry Tazewell, writing in dissent, agreed with Ronald that the statutes should be read de novo and gave a passionate opinion on that point. Although, he admitted, "adjudications upon statutes are often to be considered, as valuable expositions of the grounds and extent of the enactments, yet," he concluded, "in a case of life and death, I cannot be bound by the dictum of a British judge, upon a written law; for, although I venerate precedents, I venerate the written law more."[61] Judge George Wythe must have agreed—he registered his dissent but said that it would be "tedious and unnecessary" to state the reasons for it.[62]

Venerating the Written Law

The veneration of written law in Ronald's argument and Tazewell's opinion indicated the change that was taking place in Virginia's legal thought about both the law and the judge. Blackstone had described judges as "the depositories of the laws; the living oracles, who must decide in all cases of doubt."[63] But Ronald's argument and Tazewell's opinion—refusing to be bound by bad precedent, even if it was old precedent, when there was written law at hand—contained echoes of the new way of regarding law and the judge's role. Blackstone had also recognized that precedents "against reason" were not really precedents at all, but the arguments in the *Posey* case seemed to go further, in a direction consonant with new republican thoughts on law. In this new legal world, judges were not oracles imparting rules from "time immemorial" on a merely receptive public. Instead, they were the agents of that public, drawing their authority and their rules from writing—from laws promulgated by the people. In the most basic sense, this meant a law driven by statutes, not by judicial opinions or the common law.

But as the other judges' opinions demonstrated, Tazewell's was not the only republican option on the table. Indeed, the majority seemed willing to uphold even bad precedent in the name of certainty. They could have followed Tucker's argument, found that Coke was correct, and thus obviated the biggest question raised by the case—whether to follow long-standing

but incorrect English precedent. Judge Patrick Henry did just that, concluding that "principle and precedent unite in the interpretation" that Posey was not eligible for clergy.[64] But other members of the court were willing to go further. For example, as Judge Peter Lyons explained, precedent itself was important, since "there is more danger to be apprehended from uncertainty, than from any exposition," whether or not correct, because "when the rule is settled, men know how to conform to it; but when all is uncertain, they are left in the dark, and constantly liable to error." Judge John Tyler agreed that "it would be dangerous to decide against such long-admitted precedents upon statutes of such antiquity."[65] The other judges were in accord. Judge John Blair even noted that the precedent, though he thought it was wrong, was binding.[66]

It is unclear how far Tucker himself was willing to go toward upholding incorrect English precedent. A later reporter of the case quoted Tucker as stating in his argument to the court that Coke's construction, which had "stood the test of so many ages was not, now, to be shaken."[67] However, Tucker's argument notes suggest that this statement was more about the correctness of the precedent than its inherent binding authority. According to those notes, Tucker focused on parsing through all of the relevant statutes to conclude that Coke's opinion was actually correct. Tucker thus worked, at least primarily, within the same statutory ground as Ronald and Tazewell, although he came to a different conclusion. Tucker's statement about the importance of long-standing precedent seems to have been more about the fact that its correctness had been tested than about its authority regardless of whether it was correct.

However, emphasizing the importance of precedent would not have been entirely out of character for Tucker. After all, throughout his career, Tucker combined support for the British legal tradition with a republican emphasis on written law. His edition of Blackstone, for example, preserved much of that jurist's work while annotating sections on sovereignty and adding appendixes on issues such as the federal constitution and slavery. At the same time, as historian Ellen Holmes Pearson has shown, Tucker transformed the common law into a republican institution by arguing that in America, it was based on consent, expressly adopted by individual states through reception statutes. This viewpoint gave the common law what Pearson calls a "solidly visible foundation based on consent, choice, and new customs tailored to the needs of America's vigorous republican societies."[68]

In this essentially middle way, Tucker combined republican sentiment

with, in some areas at least, precedent—precedent was valid, but for republican reasons. Moreover, the precedent for which Tucker argued in *Posey* was not merely any pronouncement by a British judge: Coke's *Institutes* had been the text of every aspiring lawyer and a primary guide to the Virginia courts in the colonial era.

In such a situation, as the majority opinions indicated, there were republican reasons to support precedent. Precedent (at least as it was conceived in this era) restrained power by following known, disseminated rules.[69] Tazewell's opinion might follow the form of the new republican jurisprudence, but it also unsettled long-standing precedent to reinterpret a similarly long-standing statute. Doing so paradoxically put enormous power in the hands of judges, who might without warning reconfigure centuries of law—precisely the statutory construction about which the revolutionaries worried. In this new legal world, many things were up for grabs, including the meaning of republican judging. All observers seemed to agree, however, that it was about restraining power—whether through known, disseminated rules explicated in precedent or through the clarity of a statute. And again it was the judges who, although restrained by law, were also in the position to put those restraints into practice.

Guarding Republican Liberty

In both *Posey* and *Caton*, Virginia lawyers and judges of the 1780s were feeling out the meaning of republican law—and, more specifically, the proper role of a republican judiciary. In the process, the judge haltingly emerged as republicanism's guardian instead of its antithesis. In *Caton*, the principle of a limited, constitution-bound judiciary led Tucker into the world of judicial champions who guarded and vindicated the people's constitution through the exercise of judicial review. The judiciary of Tazewell's *Posey* dissent was similarly both limited and strong—limited in the sense that it was bound to decide by the texts of statutes, directly proceeding (in republican theory at least) from the people, instead of by an amorphous body of professionalized, judge-made law, but strong in its authority to upset centuries of precedent for the sake of text. The *Posey* majority's view declined to exercise this strong power but simultaneously elevated the powers of previous generations of jurists. In both cases, the judge began to emerge as a key figure for the protection of—even enactment of—republican liberty.

The law these judges were being called to defend—even, at times, against

the legislature—was the people's law, and this conception was an essential part of the new republican reality. Before the war, colonists had argued about divine justice and natural law; afterward, as Tucker explained in his edition of Blackstone, it was now more appropriate to rely on "the authority of the American Congress or of the several state Conventions than the opinions of speculative writers on government whatever: inasmuch as the declarations and acts of these BODIES were the foundation of the late revolution, and form the basis of the several republics that have been established among us; and have thus become *constitutional declarations* on the part of the PEOPLE." As a result, "those acts and declarations might be considered, *in our own republic at least*, as settling the controversy between speculative writers, in all cases to which they extend."[70]

Not only did fundamental law now come from the people but, Tucker argued, both it and more ordinary enactments remained their province. Law traditionally had been the professional realm of judges and lawyers, but Tucker argued that this proprietary knowledge should be broken wide open—indeed, that doing so was critical to protecting republican government. One of the biggest dangers to liberty, according to Tucker, was a state of affairs where only government officials had access to and knowledge of the law. As government became more complex in civilized society, those who administered it acquired "a mechanical acquaintance with its powers" that enabled them, "by a slight alteration in the frame, [to] produce an entire revolution in the principles of its action; to detect the cheat requires a thorough acquaintance with the principles of its original construction, and the purposes to which it was intended to be applied." For this reason, knowledge of legal science needed to be widespread. "Science," he wrote, "counteracts this mechanical monopoly of knowledge, and unfolds to its votaries those principles which ought to direct the operations of the machine." After all, "man only requires to understand his rights to estimate them properly; the ignorance of the people is the footstool of despotism."[71]

But democratizing law meant not jettisoning it but rather educating the people at large as to its workings. Partly for this reason, Tucker published his edition of Blackstone's *Commentaries*, which, like many other law reform projects of this era, collected in one place widely scattered statutes and precedents for easily accessible use. Protecting liberty required enabling the people to know what the law was and how it worked. Law restrained government and empowered the people. And the systematization of knowledge—the science of liberty—was both the result of a free government and nec-

essary to preserve it. An "enlightened people," he wrote, "who have once attained the blessings of a free government, can never be enslaved until they abandon virtue and relinquish science."[72] Writing out the law and disseminating it—statutes, cases, and constitutions—was in this way a professional exercise, but it was also an essential part of protecting liberty. The law was popular, but it was no less law.

Tucker, like many of his Virginia colleagues, thus struck a precarious but deeply committed balance between professionalization and democratization, with each in service of the other. A constitution was fundamentally law, within the special province of the judges and lawyers, and at the same time was fundamental law, proceeding from the people. The law was science, but it was science that should be widely disseminated. Attention to the law as science, legal learning, law reform, and professionalism was meant not to take the law from the people but to give it back to them. Law—and by implication, the judiciary—might be a fraught site for republican liberty, but it also had particular, perhaps even peculiar, potential.

In the midst of all this republican theory were cases like John Crane's, and in this atmosphere, Lee's insinuations—of partiality and "bloodthirstiness"—had a special sting. By now Tucker was in his third year as a General Court judge. He had been appointed in 1788, when Virginia's court reorganization had also created district courts, each staffed by two judges from the General Court riding circuit.[73] The district court circuit responsibilities were arduous, putting Tucker on the road each spring and fall. After a year, he had considered resigning, but financial concerns pressed him to continue.[74] His reluctance to be absent was undoubtedly increased by the death of his wife, Frances, in early 1788, leaving him with the care of three teenaged stepsons and his own five young children.[75] Tucker had also become the professor of law and police at William and Mary, where he taught during his time off the bench in the summer and winter.[76] When added to his district court responsibilities and the General Court's twice-yearly sittings in Richmond, law kept Tucker busy year-round.

Murder cases, however, were still unusual occurrences, and as Tucker wrote on September 3, 1791, he had reason to be upset. Crane's life was hanging in the balance, and Lee had publicly impugned the judge's impartiality—essentially, his fitness as a republican judge. As Tucker wrote to Lee that evening, he might have already decided to offer Crane the option of taking the jury's question—murder or manslaughter—to the General Court. But that did not stop Tucker from telling Charles Lee that he thought Crane had got-

ten off easy with the special verdict—that anything omitted from the verdict that would have been favorable to Crane was far outweighed by facts that were damning. "I own I was satisfied with the Verdict," he admitted, "as one more favorable to the pr[isoner] than I expected." Nevertheless, Tucker reminded Lee, he had done his best to be lenient to the prisoner during the trial. He had even declined to instruct the jury on the testimony; if he had, Tucker told Lee, "there were several parts of the verdict which must have undergone a considerable alteration to the prejudice of the pr[isoner]."[77] But when it came to Lee's words, Tucker's real concern, he explained, was the "idea conveyed by such a turn of expression," one strong enough to "rouse a temper less susceptible than my own to an instant reply."[78] He was satisfied, he insisted, that although he might have deviated from Lee's "ideas of strict propriety, as it respected the prisoner, I can not reproach myself." When it came to his colleague's feelings, however, "I most sincerely regret it."[79]

Tucker did not flinch from telling Lee his feelings about Crane's guilt because the issue for him—his offense at Lee's insinuations of bloodthirstiness—was not about his belief in Crane's guilt but rather was about impartiality and fairness. This was certainly about honor, a concept that generations of historians have ably discussed in relation to the South. But honor needs something on which to hang its hat—a threatened value on which to operate. Here, the honor at stake was republican honor, and its threatened value was Tucker's identity as a republican judge. As judge, Tucker saw himself as both the preserver of the forms of republican government and the champion of its substance. This was a new conception, but it was already gelling as he addressed the jury's special verdict and the objections put forth by Lee.

Of course, ideas could be put to different uses, as would be seen on the national stage with *Marbury v. Madison*. When Virginian John Marshall, now a chief justice with strong Federalist sympathies in a hotly partisan environment, began his famous pronouncement of judicial review in 1803, his first line almost perfectly echoed what Tucker had argued to the *Caton* court more than twenty years earlier: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule."[80] Tucker, after all, had told the Virginia court in 1782, "Now I hold it to be uncontrovertible that the power properly belonging to the Judiciary Department is to explain the Laws of the Land as they apply to particular Cases."[81] Of course, cases endorsing judicial review had already begun to pop up across the country, and Marshall's opinion asserted the power of the Federalist-

heavy judiciary to invalidate the power of a Jeffersonian administration. But despite the partisan environment in which *Marbury* was issued, Marshall was a Virginian and was asserting a principle with a long Virginia history. Tucker himself—by then a strong Jeffersonian—had recognized in his version of the *Commentaries*, drafted before *Marbury*, that federal courts could exercise judicial review.[82] Of course, many things that the Federalists sought to do in the courts vexed Tucker and his fellow Jeffersonians, but when it came to the idea of judicial review, Marshall's doctrine had a strong Virginia accent.[83]

In this way, examining this formative era in Virginia's legal history also highlights the extent to which political alliances and ideological disputes, not sectional ones, would construct and propel American law into the nineteenth century. In 1791, Marshall was Virginia lawyer in a state where a strong judiciary with the power of judicial review had broad support.[84] The legal world of 1791 was in this sense a moment before—before the political alliances that would pull apart former allies and weave new partisan considerations into the stakes of legal doctrine. Alexander Hamilton had not yet presented his *Report on Manufactures*; there was as yet no Jay Treaty, no XYZ affair or Alien and Sedition Acts—none of the incidents that would drive new Americans and fellow Virginians further and further apart until they were dominated, as Marshall lamented to Tucker in 1800, by an "intolerant and persecuting spirit which allows of no worth out of its own pale, and breaks off all social intercourse as a penalty on an honest avowal of honest opinion."[85]

Virginians of this era were not only fresh from the experience of being an individual colony but also deeply embedded in national power networks. They were sometimes part of a "southern" interest but at other times had more in common with other mid-Atlantic states. Even as Tucker and other men looked forward, they were still primarily defined by the categories that were behind them—by the new governments they had established and by the working out of the principles of those governments in practice. They were Virginian, yet in many ways, they defined and would continue to define what it meant to be American.

With this moment came great responsibility and great creativity, and Judge Tucker keenly felt those weights on the bench in Virginia in 1791 as he scribbled lectures for his law students about the preservation of liberty on spare pages in his docket books. What did it mean to have a written constitution? And what was the role of the judiciary in a republican state?

These were not just academic questions—nothing less than the survival of the new nation as well as his adopted state was at stake. To Tucker, this new era demanded new attention to "legal science," something that was for him an essentially and an explicitly democratic undertaking. And at its most essential level, this science was about guarding republican liberty.

The key figure in this emerging paradigm was increasingly the republican judge. From Tucker's suggestion to the court in *Caton* that it could declare acts of the legislature to be void to the discussions about precedent versus written law in *Posey*, judges were becoming pivotal figures—the servants who put the state under the people and kept it there. In this way, the process of judging—of exercising power to restrain power, at precisely the point where that power met the people—was becoming, in the 1790s, one of the most important acts of republican citizenship.

NOTES

1. St. George Tucker to Charles Lee, September 3, 1791, Tucker-Coleman Collection, Swem Library Special Collections, College of William and Mary, Williamsburg, Virginia. Spelling, capitalization, and punctuation of original documents has been retained, with the exception of substitution of "s" for "f" where appropriate and occasionally other modernization for clarity.

2. See "Petition of Citizens for the Pardon of John Crane, Jr.," April 20, 1792, in *The Calendar of Virginia State Papers*, ed. William P. Palmer and Sherwin McRae (Richmond, 1875–93), 5:510–11; *Commonwealth v. John Crane, the Younger*, 3 Va. 10, 13 (1791).

3. *Commonwealth v. John Crane, the Younger*, 13.

4. St. George Tucker, "Note F," in *Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, ed. St. George Tucker (Philadelphia: Birch and Small, 1803), 4:64–65.

5. John Langbein, "The Criminal Trial before the Lawyers," *Chicago Law Review* 45, no. 2 (1978): 263, 296.

6. *Blackstone's Commentaries*, ed. Tucker, 4:376 n. 31.

7. St. George Tucker to Charles Lee, September 4, 1791, Tucker-Coleman Collection.

8. Charles Lee to St. George Tucker, September 4, 1791, ibid.

9. Virginia district courts ordinarily comprised two judges; Tucker presided alone in Crane's case because Judge Henry Tazewell was ill. For more on *Crane*, see Jessica Lowe, "Murder in the Shenandoah: *Commonwealth v. John Crane* and Law in Federal Virginia" (PhD diss., Princeton University, forthcoming).

10. St. George Tucker to Charles Lee, September 4, 1791, Tucker-Coleman Collection.

11. Christopher Leonard Doyle, "Lord, Master, and Patriot: St. George Tucker and Patriarchy in Republican Virginia, 1772–1851" (PhD diss., University of Connecticut, 1996).

12. R. Kent Newmyer, "Harvard Law School, New England Legal Culture, and the Origins of Antebellum Legal Culture," *Journal of American History* 74, no. 3 (1987): 831–32.

13. For Virginia law reform generally, see Charles T. Cullen, *St. George Tucker and Law in Virginia* (New York: Garland, 1987); Kathryn Preyer, "Crime, the Criminal Law, and

Reform in Post-Revolutionary Virginia," *Law and History Review* 1, no. 1 (1983): 53–85; A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture 1680–1810* (Chapel Hill: University of North Carolina Press, 1981).

14. *Blackstone's Commentaries*, ed. Tucker, 1:x.

15. *Republican* has a complicated scholarly history. For an account, see Daniel T. Rodgers, "Republicanism: The Career of a Concept," *Journal of American History* 79, no. 1 (June 1992): 11–38.

16. See Davison M. Douglas, "Foreword: The Legacy of St. George Tucker," *William and Mary Law Review* 47, no. 4 (2006): 1114–15; Charles F. Hobson, "St. George Tucker's Law Papers," *William and Mary Law Review* 47, no. 4 (2006): 1246–47.

17. Cullen, *St. George Tucker*, 13.

18. See Phillip Hamilton, *The Making and Unmaking of a Revolutionary Family: The Tuckers of Virginia, 1752–1830* (Charlottesville: University of Virginia Press, 2003).

19. *Commonwealth v. Caton*, 8 Va. 5 (1782).

20. See Tucker's Notes of Argument in *Commonwealth v. Caton*, *Commonwealth v. Caton* File, Tucker-Coleman Collection.

21. *Commonwealth v. Caton*, 5.

22. For more on *Caton*, see William Michael Treanor, "The Case of the Prisoners and the Origins of Judicial Review," *University of Pennsylvania Law Review* 143, no. 2 (1994): 491–570.

23. Ibid., 505.

24. Tucker, Notes of Argument, 2.

25. Ibid., 2–4.

26. Ibid., 5–6.

27. Ibid., 7–9.

28. Ibid., 9–10.

29. Gordon Wood, *Creation of the American Republic* (1969; Chapel Hill: University of North Carolina Press, 1998), 296–98.

30. Morton Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard University Press, 1977), 5.

31. See, e.g., Wood, *Creation of the American Republic*, 298.

32. Thomas Jefferson to Edmund Pendleton, August 26, 1776, in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd et al. (Princeton: Princeton University Press, 1950), 1:505.

33. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

34. Ibid., 54.

35. Tucker, Notes of Argument, 7–8.

36. Ibid., 9.

37. St. George Tucker, 1791 General Court Docket Book, Tucker-Coleman Papers. This note is then continued in the 1792 Docket Book, so it was written sometime in that year or afterward.

38. Ibid.

39. *Blackstone's Commentaries*, ed. Tucker, 1:91 n. 20.

40. *Commonwealth v. Caton*, 7.

41. See Treanor, "Case of the Prisoners," 497.

42. Kramer, *People Themselves*, 82.

43. Charles Hobson, "Biographical Introduction," in *The Law Papers of St. George Tucker* (Chapel Hill: University of North Carolina Press for the Omohundro Institute of Early American History and Culture, forthcoming).

44. See St. George Tucker's notes of counsel's argument in *Kamper v. Hawkins*, 1793 General Court Docket Book, Tucker-Coleman Collection. See also Hobson, "St. George Tucker's Legal Papers," 1275. Thanks to Charles Hobson for reminding me of this fact.

45. See Kramer, *People Themselves*, 69.

46. Treanor, "Case of the Prisoners," 500.

47. Roeber, *Faithful Magistrates*.

48. See John Thornton Posey, "A Federalist on the Frontier: General Thomas Posey," *Illinois Historical Journal* 83, no. 4 (Winter 1990): 247–58; Malcolm Hart Harris, *Old New Kent County* (West Point, Va.: Clearfield, 2006), 97–99; "Record of the Trial of John Price Posey," March 3, 1786, in *Calendar of Virginia State Papers*, ed. Palmer and McRae, 4:95.

49. Harris, *Old New Kent County*, 97–99. For the "laborer" designation, see Indictment, in *Commonwealth v. Posey* File, Tucker-Coleman Collection. For Green and Posey, see "William Clayton to the Governor of Virginia," July 20, 1787, in *Calendar of Virginia State Papers*, ed. Palmer and McRae, 4:321; "Will. Clayton to Lieut.-Gov. Randolph," August 7, 1787, in *Calendar of Virginia State Papers*, ed. Palmer and McRae, 4:329–30.

50. Edmund Pendleton to Thomas Jefferson, August 10, 1776, in *Papers of Thomas Jefferson*, ed. Boyd et al., 1:490.

51. Preyer, "Crime, the Criminal Law, and Reform," 69. See also Markus Dirk Dubber, "An 'Extraordinarily Beautiful Document': Jefferson's Bill for Proportioning Crimes and Punishments and the Challenge of Republican Punishment," in *Modern Histories of Crime and Punishment*, ed. Markus Dirk Dubber and Lindsay Farmer (Stanford, Calif.: Stanford University Press, 2007), 115–50.

52. Preyer, "Crime, the Criminal Law, and Reform," 69.

53. Frances Bland Randolph Tucker to St. George Tucker, October 9, 1787, Tucker-Coleman Collection.

54. St. George Tucker to Frances Bland Randolph Tucker, November 3, 1787, in ibid.

55. On Ronald's participation in *Caton*, see Treanor, "Case of the Prisoners," 519. On Ronald's *Posey* argument, see Tucker's notes of Ronald's argument, *Commonwealth v. Posey* File, Tucker-Coleman Collection.

56. See Tucker's notes of Ronald's argument, *Commonwealth v. Posey* File, Tucker-Coleman Collection.

57. St. George Tucker to Frances Bland Randolph Tucker, November 3, 1787, ibid.

58. Frances Bland Randolph Tucker to St. George Tucker, n.d. [filed with November 1787], ibid.

59. St. George Tucker, Notes of Argument for the Commonwealth, *Commonwealth v. Posey* File, ibid.

60. Ibid.

61. *Commonwealth v. Posey*, 8 Va. 108, 116 (1787).

62. Ibid., 122.

63. *Blackstone's Commentaries*, ed. Tucker, 1:68–69.

64. *Commonwealth v. Posey*, 113.

65. Ibid.

66. Ibid., 121–22. Judge Tyler noted, however, that his decision was limited to a British statute, and "upon one of our acts of assembly, I shall, whenever the case is doubtful, incline to follow the letter of the statute."

67. Call's reporter included this argument. See 1787 Va. LEXIS **3, **4 (Va. 1787).

68. Ellen Holmes Pearson, *Remaking Custom: Law and Identity in the Early American Republic* (Charlottesville: University of Virginia Press, 2011), 30. Morton Horwitz also

emphasizes the transformation in this era of the authority of the common law from natural law to consent, although he sees Tucker as a more ambiguous figure.

69. See Horwitz, *Transformation of American Law*, 5–9.

70. *Blackstone's Commentaries*, ed. Tucker, 1:vii–viii.

71. Ibid., 1:xvi.

72. Ibid., 1:xvii.

73. Cullen, *St. George Tucker*, 195.

74. Hobson, "Biographical Introduction"; Hamilton, *Making and Unmaking*, 93–94.

75. Hamilton, *Making and Unmaking*, 67–69.

76. Ibid.

77. St. George Tucker to Charles Lee, September 4, 1791, Tucker-Coleman Collection.

78. Ibid.

79. Ibid.

80. *Marbury v. Madison*, 5 U.S. 137 (1803).

81. Tucker, Notes of Argument, 3.

82. *Blackstone's Commentaries*, ed. Tucker, 1:91 n. 20.

83. Treanor takes a similar view in "Case of the Prisoners," 499.

84. Indeed, as Huebner has shown in his study of Spencer Roane, judges could both favor a strong judiciary and be zealous in the protection of states' rights. See Timothy Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890* (Athens: University of Georgia Press, 1999), 10–39.

85. John Marshall to St. George Tucker, November 18, 1800, Tucker-Coleman Collection.

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The Shades of Loyalty

Elisha W. Chester and the Cherokee Removal

Tim Alan Garrison

IN 1841, the *Advocate of Moral Reform* printed an editorial describing how the New York Female Moral Reform Society, the group that published the newspaper, was involved in a bitter dispute with its publishing agent. The society had relieved Charles Yale from his position for certain financial irregularities; Yale, in retaliation, had published a pamphlet condemning the society and accusing it of using funds offered for philanthropic purposes for the private benefit of its trustees. The editor noted that a local lawyer and member of the society, Elisha W. Chester, chaired a committee that had investigated Yale, and that Chester had discovered Yale's offensive pamphlet and provided it to the newspaper. The *Advocate* added that the society had acted with propriety in the dispute and suggested that a committee led by a man of Chester's stature was sufficient to prove the legitimacy of the society's conduct. Chester, the editor declared, was "a gentleman well known to the public, and one who cannot be suspected of any selfish interest in this manner, a man whose opinion could be trusted." Chester, the paper added in a footnote, was "a very respectable lawyer of this city, whose name will be recognized, when we mention that he is the gentleman associated so honorably with Mr. Wirt in the case of Messrs. Worcester & Butler, the missionaries who were imprisoned in the Georgia Penitentiary."[1]

In his attestation of Chester's character, the editor of the *Advocate* was referring to a famous U.S. Supreme Court case, *Worcester v. Georgia* (1832). Although Samuel A. Worcester and the other named parties in the case were Congregationalist missionaries from the Northeast, the decision also directly affected the fate of the Cherokee Nation and the other Indian nations residing within territory claimed by the United States. In *Worcester*, Chief Justice John Marshall declared that the Indian tribes represented distinct,

sovereign nations.[2] Chester later used the fact that he had represented the Cherokees and missionaries as a testament to his integrity and to advertise his legal services to elite northeasterners. Chester likely did not tell clients and colleagues that many Cherokees believed he double-crossed them after the case and attempted to push them out of their homeland. Many Cherokee leaders took this view in the years after *Worcester*, and Chester faced this charge for the rest of his life. In the months after the *Worcester* ruling, still on retainer for the Cherokees, Chester began taking steps that suggested that he did not have their interests exclusively in mind.

Elisha W. Chester was born in 1795 in Groton, Connecticut. In 1818, he graduated from Middlebury College, a Congregationalist school in Vermont. Chester then began preparing for and was admitted to the bar. In the early 1820s, he moved to Georgia. By 1823, he was practicing law in Gwinnett County, just northeast of present-day Atlanta and at the time just a short horseback ride from the southeastern border of the Cherokee Nation. By the late 1820s, Chester had developed a successful practice, was married and the father of two young children, and had purchased two slaves. He was involved in his community and local church and had joined a partnership to establish an academy, which his children would presumably attend when they were ready for schooling.[3]

Records do not indicate when Chester and his firm became involved with the Cherokees, but he quickly developed a reputation as a trusted advocate for the tribe. William Rogers, who later became a prominent Cherokee planter, declared in a letter around the time of the *Worcester* decision that Chester was a "lawyer of some reputation and ability." By 1820, Georgia's congressional delegation, governor, and state legislature were calling on the national government to remove the Cherokees from the state. However, the Cherokee government resisted pressure to cede its lands and refused to contemplate any suggestion of a general removal. The government's officials consistently maintained that the Cherokee people constituted a sovereign nation that existed independent of the states and under the federal government's protection. The United States, they noted, had acknowledged Cherokee sovereignty and territorial rights in the Treaties of Hopewell (1785) and Holston (1791) and several subsequent agreements. In 1827, the Cherokees adopted a republican constitution that asserted to the world their independent, sovereign status. In the late 1820s, the Georgia legislature responded by extending the state's jurisdiction over Cherokee territory and purported

to abolish the Cherokee Nation's laws and government. Then the legislature established a process to survey and seize the Cherokees' land and distribute it to white Georgians via lottery. In 1828, Andrew Jackson was elected president; not long after the inauguration, his congressional allies passed the Indian Removal Act of 1830, which authorized the president to negotiate removal treaties with the Indian tribes inside state borders. Under these agreements, Indian tribes would exchange their lands for new territories west of the Mississippi and relocate there within a set period of time. By the time of the *Worcester* case, the Jackson administration had concluded removal treaties with the Choctaw and Creek nations and was coercing other tribes to sign relocation agreements.[4]

Cherokee removal was by no means inevitable, however. Many American citizens disdained Jackson's expropriation methods; some openly supported the Cherokees' resistance. Missionaries from the American Board of Commissioners for Foreign Missions (ABCFM) who had moved into the Cherokee Nation in the late 1810s and early 1820s were particularly sympathetic and encouraged the Cherokees to oppose removal. In December 1830, to break the Cherokee-missionary alliance, the Georgia legislature enacted a statute forbidding white persons from residing in the Cherokee Nation without a state license and gave the missionaries until March 1, 1831, to obtain such a license or leave. On January 1, 1831, Worcester issued a memorial on behalf of the missionaries condemning Georgia's actions and declaring their intention to challenge the statute. The Cherokee government likewise initiated litigation challenging Georgia's series of legislative trespasses. William Wirt, who had been advising the Cherokee Nation from Washington, and Chief John Ross brought a constitutional challenge to Georgia's anti-Cherokee laws before the U.S. Supreme Court. In *Cherokee Nation v. Georgia* (1831), the Cherokee government argued that the state's efforts to extend its authority over the Cherokees' land violated their nation's sovereignty and encroached on their treaties with the United States. The U.S. Supreme Court, however, refused to accept jurisdiction over the conflict. Although Marshall noted his sympathy for the Cherokees' situation, he explained that Article 3 of the U.S. Constitution offered the Court original jurisdiction only over disputes between a state and a "foreign state." The Cherokee Nation was not a "foreign state," Marshall wrote, but a "domestic, dependent nation." Chief Ross told his constituents that the decision was a temporary setback and noted that the chief justice had acknowledged the legitimacy of their grievances. Language in

the opinion did, in fact, offer the chief reason for his optimism. Marshall had commented that the Cherokees might later achieve success in their struggle if they brought "a proper case with proper parties."[5]

Georgia provided that opportunity by harassing the ABCFM missionaries. The day after the residency statute took effect, the state arrested Worcester, a longtime acquaintance of Chester, and several other missionaries for violating the residency law. Chester's firm, Chester, Harris, and Underwood, agreed to represent the missionaries at the state level. Chester acknowledged that the missionaries were living in the Cherokee Nation without a license from the governor but challenged the state's assertion of authority over Cherokee territory. The Georgia court upheld the licensing statute's legitimacy, and the jury delivered a verdict of guilty against the missionaries after only fifteen minutes' deliberation. The judge sentenced Worcester, Elizur Butler, and the other missionaries to four years of hard labor in the Milledgeville State Penitentiary. After the trial, Governor George Rockingham Gilmer offered a pardon to any missionary who agreed to leave the state; all but Worcester and Butler accepted the deal. The two holdouts declared that they would serve their sentence or see Georgia's laws overturned by a higher court. Although most contemporaries believed Chester had little chance of victory in Georgia from the beginning, Worcester was satisfied that Chester had "argued the case well."[6]

Chester counseled the missionaries after their convictions and comforted their families during the appeal process; Worcester's correspondence with the ABCFM indicates that the lawyer had secured the missionary's loyalty and respect. And just as Worcester trusted his attorney, Chester had come to confide in the preacher. Worcester reported that Chester said that representing the missionaries against the state was ruining his legal career. His local clientele, mostly proremoval supporters, backed the state's attack on the missionaries and would be disinclined to use his services in future. Prompted by Worcester's reports, on October 25, 1831, David Greene, the ABCFM corresponding secretary, expressed his appreciation for Chester's work: "Our committee feel under great obligations to you for the zeal with which you have exhausted the cause of the missionaries in this season of trial."[7]

The trust that Chester established with Worcester and the mission society was also evident from requests Greene made in this letter. Greene asked Chester to provide information about the missionaries' sentences and conditions in the Georgia penitentiary. Greene also asked how the "religious people" in North Georgia felt about the missionaries' imprisonment and

whether a "transfer of power from one party in the state to another" would have an effect on the missionaries' case. Chester was clearly more than just a legal advocate for the missionaries. He was now the eyes and ears of the ABCFM in Georgia, implicitly charged with the welfare of the group's agents. This developing relationship between Chester and the ABCFM would have serious consequences for the Cherokees, whose leaders failed to appreciate the lawyer's growing influence on their friends at the mission board.[8]

Ross and the ABCFM arranged for Wirt, former U.S. attorney general under Presidents James Monroe and John Quincy Adams, to represent the missionaries before the U.S. Supreme Court. Wirt was assisted by John Sergeant, the former attorney for the Bank of the United States and an ally of Henry Clay. The missionaries were appealing a state conviction, and the case necessarily required interpretations of the U.S. Constitution, federal laws, and treaties; Article 3 of the Constitution provided "federal question" authority for the Court to rule on Georgia's assertion of jurisdiction over the Cherokees.[9]

In February 1832, Chester traveled to Washington and sat with Wirt and Sergeant for the oral arguments. The two renowned attorneys generally followed the arguments Chester originally proffered in the Georgia court. The arrest of the missionaries was illegal and unconstitutional because the Georgia laws under which the defendants had been detained violated the sovereignty of the Cherokee Nation. The Treaty and Commerce Clauses of the U.S. Constitution provided the federal government with complete jurisdiction over relations with the Indian tribes; Georgia's subjugation of the missionaries and its entire legislative effort to intimidate the Cherokees encroached on the treaty relationship that existed between the Cherokee Nation and the United States.[10]

On March 3, 1832, the Court reversed the missionaries' convictions and ordered them released. Chief Justice Marshall, writing for the Court's majority, declared that the Cherokee Nation retained significant powers of sovereignty. Georgia's laws and efforts to constrain the missionaries' freedom wrongfully intruded on those powers and the authority of the United States. He appointed Chester to carry the order to free the missionaries back to Georgia. The Georgia court, in a bald repudiation of federal judicial authority, refused to reverse the convictions or release the missionaries. To make matters worse, in subsequent weeks neither President Jackson nor Congress tried to force Georgia to abide by the Supreme Court's decision. As a result, Georgia's seizure of Cherokee territory proceeded apace. At the announce-

ment of *Worcester*, the Cherokees thought their lawyers had secured a momentous result, enabling them to remain in the South. Through the ensuing spring and summer, they began to realize that the U.S. government intended to ignore the decision and insist that they abandon their homeland. Chester, back in Georgia, informed the Supreme Court that the state court judge had refused to even enter its judgment in the case record. Thereafter, the U.S. Supreme Court, Congress, and the Jackson administration did nothing to prevent Georgia from expropriating the Cherokees' land. Chester's work to defend the sovereignty and territorial integrity of the Cherokee Nation had been for naught.[11]

Chester remained on retainer for the Cherokee Nation and the mission board for several months after the *Worcester* controversy. He failed to persuade Wilson Lumpkin, Georgia's new governor, to release the missionaries. On April 4, 1832, he declared bitterly to Lumpkin that the state's imprisonment of Worcester and Butler in defiance of the Supreme Court's judgment was unique "in the annals of this boasted land." He prepared a memorial asking the president to intervene, appealing emotionally for Jackson and Congress to recognize the Cherokees' sovereignty. As late as the first week of April 1832, Chester appeared to be a trusted and articulate advocate for the Cherokees.[12]

Within days of making pleas to Lumpkin and Jackson, however, Chester expressed an interest in serving as a mediator for the U.S. government in the removal process. It is not clear why Chester decided to abandon his support for the Cherokee opposition to removal at this particular time; perhaps he had earlier supported the Cherokee position because he was hired to represent their interests before the courts and now felt free to pursue his own agenda. Alternatively, Chester may have been emotionally invested in the Cherokees' fate but was now pessimistic about their ability to remain in the South. Prominent Cherokee men such as Major Ridge, John Ridge, and Elias Boudinot had begun to contemplate removal after the federal government demonstrated its reluctance to enforce *Worcester*. Regardless of Chester's motives, as of early April 1832, Ross and the Cherokee government still believed that Chester was an ally. They also assumed that the Cherokees retained the influential support of the ABCFM. At that point, the partnership among the Cherokee Nation, the ABCFM, and Chester began to unravel.

Chester apparently began to rethink his support for Cherokee resistance immediately after the announcement of the *Worcester* decision. When it appeared that the federal government would not intercede in the Georgia-

Cherokee crisis, he boldly expressed his changed views. In the second week of April 1832, he traveled to Boston to speak with the ABCFM. On the way, he stopped in Washington and met Secretary of War Lewis Cass and other officials in the War Department. Chester told Cass that he held the confidence of influential Cherokees and could mediate a removal treaty. Persuaded by the lawyer's Cherokee connections, Cass appointed Chester as a special agent to deliver the government's removal proposal to the Cherokees. The proposal promised "extensive and fertile" lands west of Arkansas, payment for transportation costs, permission for Cherokees to manage their own relocation, and one year's subsistence support after arrival in the West. Once they settled in their new territory, the Cherokees could maintain their own government. The United States would ensure that white Americans would not enter Cherokee territory and would prevent attacks by nearby tribes. The U.S. government would also make annual payments for the southeastern lands the Cherokees surrendered, catch the Cherokee government up on the two years owed on existing annuities, and compensate Cherokee individuals for improvements and livestock lost during the removal. The proposal also promised U.S. funding for the nation to build schools, churches, and government buildings in the new territory and support to aid Cherokee orphans. Chester apparently considered this a very generous offer on the part of the United States.[13]

After collecting Cass's proposal, Chester visited Wirt and Sergeant and tried to persuade them to convince the Cherokees to sign a removal treaty. Chester then traveled to Boston, where he urged the ABCFM to end its support for Cherokee resistance. Chester's influence on the mission board's acceptance of relocation is revealed in a flurry of letters in mid-April. On April 15, Greene wrote of his fears that Chester was "exposing himself to great temptation." Greene added that he had heard that Chester had been involved "in very intimate communication with the Secretary of War" and that the lawyer had "used many arguments to convince me that the Cherokees had better sell out." Chester, Greene rightly suspected, was now acting for the U.S. government and was intent on securing a removal treaty from the Cherokees. Greene also consulted with Wirt, learning that Chester had broached the possibility of a removal treaty in recent conversations with the former attorney general. Wirt told Greene that he had "strongly reprobated the whole scheme" to Chester.[14]

Ten days later, Greene informed Chester that it would be best for the Cherokees to wait at least a year before signing a removal treaty. A treaty at the

present, he wrote, would be "a virtual yielding to Georgia, after the Supreme Court has decided against her." He added that the Cherokees should see if Congress would take any action against Georgia and determine whether the Supreme Court would move to enforce its decision. "Why pursue a course which must almost necessarily oblige the court to be contemned in the face of the whole land, and allow Georgia to go through, & come off with impunity or even triumph, in her nullification and rebellion?" The following March, Greene concluded, would be a better time for the Cherokees to contemplate a removal treaty if they ultimately agreed that doing so was their best course.[15]

The ABCFM files contain a memorandum that Chester wrote around May 1, 1832. Chester may have used the document, titled "Reasons Why the Cherokees Should Make a Treaty *Now*," to organize his thoughts in meetings with Greene and the ABCFM executive committee. The document's presence in the mission board's archives may indicate that it was a collaborative effort, developed by Greene and Chester, perhaps as a means of developing a public rationalization for the ABCFM's abandonment of the Cherokees. In either case, Chester clearly constructed the ABCFM's rationale for giving up its resistance to removal as it was expressed to Butler and through him to Worcester while both of them were sitting in a Georgia prison; to northern Christians sympathetic to the Cherokees' plight; to Whigs who wanted to use removal as a political weapon to defeat Jacksonians in the upcoming election; and especially to the Cherokees, whose chief had pleaded with the board that they could withstand the pressures to relocate.[16]

At the outset of the document, Chester wrote, "In consulting upon what advice is to be given to the Cherokees in relation to a treaty, two questions arise—1st—What will be the influence of such a measure upon the Cherokees? 2nd What [will be] its influence upon our own country?" His first question had two possible answers. If the "present [Jackson] administration continued," he predicted, "the laws of Georgia will continue to be executed—[the Cherokees'] lands will be seized,—they will driven from their country." He then asked what would happen "in case of a change of administration." He again predicted disaster for the Cherokees. In that event, he wrote, "It is not unlikely in that case that Georgia will dispose of the lands & they will be taken possession of before the new President can interfere." If Jackson lost, Chester thought that Georgia would "hasten every measure. The country will be filled & the approach of an armed force would be the signal for the destruction of the Indians. A predatory war would ensue—ruin would be

spread over the land. Help [in the form of a Clay presidency] would come too late." The most a new Clay administration might do, Chester theorized, would "be to treat with them" and provide favorable removal terms. Even so, he noted that there would be a large faction of Jacksonian Democrats in the Senate ready to reject any Clay administration treaty that offered the Cherokees reasonable terms.[17]

Chester then turned to the impact of continued Cherokee opposition to removal on the United States. First, he wrote, "if Jackson is reelected the [U.S. Supreme Court] will be prostrated & the Govt virtually dissolved." Conversely, Chester surmised, if Clay were elected, to protect the Cherokees he would have to "array the military force of the Union against a State surrounded by her friends, some of which would exult in such an opportunity of ending the Union." Chester concluded that it was not the time to try to vindicate the authority of the U.S. Supreme Court. To do so would "risk its utter overthrow." He suggested that concerns for the legitimacy of the Court be postponed to "another time" when "this power may be tested with better hope of a happy result."[18]

Chester's arguments impressed Greene. The mission board secretary discussed the removal proposal with the other members of the ABCFM's executive committee. On May 1, he informed Rufus Anderson that Chester was in town visiting with the board and that the lawyer had told him "the poor Cherokees must sell out and remove." A few days later, the executive board, after considering Chester's arguments, moved to abandon its long-standing support of the Cherokees.[19]

On May 2, Greene informed Theodore Frelinghuysen, the New Jersey senator who had led the opposition to the Indian Removal Act, that the ABCFM had changed its position on removal because his interview with Chester had convinced him the United States would not protect the Cherokees from Georgia's trespasses. Chester had argued and Greene now realized that Jackson would not enforce *Worcester v. Georgia*. Greene knew "something of what the Creeks and Choctaws have endured" in their relocation and could use that knowledge to imagine what would happen to the Cherokees as a consequence. "It is perfectly plain to every reflecting mind," he wrote, "that the population of one of our counties could not be gleaned up and transported 600 miles . . . without almost inconceivable suffering, however faithful and kind servants might be employed, and however well they might be provided with food, clothing, & vehicles." What upset him more than anything, Greene wrote, was how Georgians celebrated "the bro-

ken laws & faith of the nation." A civil war between Georgia and the United States, Greene added, might be preferable to watching the country compromise its laws and ideals by forcing the Cherokees to sign a removal treaty. Despite his personal misgivings, however, the mission board could no longer countenance resistance.[20]

Chester's visit to the ABCFM headquarters was, therefore, an extremely important event in the Cherokee removal crisis. After Chester's conversations with Greene, the mission board ended its opposition to removal and recommended Cherokee relocation. Chester's meeting with Greene also affected subsequent removal negotiations. Greene and Chester agreed to approach the Cherokees with a compromise position. The ABCFM would encourage the Cherokees to accept the idea of removal on principle while promising to lobby Congress to secure removal terms favorable to Cherokee interests. Several of the terms initially described in conversations between Chester and Greene ended up in the removal treaty that a dissident band of Cherokee representatives signed with the United States at New Echota in December 1835. The provisions developed by Chester and Greene gilded Cass's proposal and gave them flexibility. Chester probably understood that no arguments would convince Cherokees who were adamantly opposed to removal, but he also knew that some prominent Cherokee men had decided that further resistance was futile. As a result, he acted to persuade those Cherokees who were undecided—that is, those who were beginning to question continued opposition to removal. Chester was also aware that the ABCFM missionaries living in the Cherokee Nation held considerable influence among their flocks. By persuading the mission board to abandon its support of the Cherokee resistance, he could explain to the Cherokees that their most sincere supporters had now determined that removal was the best course. Chester must have headed back to Georgia in an optimistic frame of mind.

Greene moved swiftly to announce the board's change of position to the Cherokees. On May 3, he wrote to John Ridge, who was emerging as a Treaty Party leader, and advised him of the recent meeting with Chester on the Cherokees' plight. Greene wrote that the executive committee had discerned that both political parties in Washington were of the opinion that the Cherokees' rights could not be protected in their present homeland and that the parties were "prepared to unite in advising you to enter into a treaty to remove." Greene told Ridge that in light of the circumstances as Chester described them, the Cherokees should take "the least of two evils," removal or destruction, and "make the best terms you can, & go, dreadful as

the thought is." Greene warned that if the Cherokees did not relocate, they would become "worn, & wasted & condensed"; conversely, they still had the opportunity to pursue "peace and prosperity in the West."[21]

On May 30, Chester reported to Cass that he had delivered the U.S. government's proposal for Cherokee removal. He said that he had visited with "a few of the Cherokees on this side of the nation, and find them ready to join heartily in promoting a treaty." Chester asked Cass if the government would pay for one of the proremoval Cherokees to go with him to meet with John Ross and help him try to convince the chief to embrace relocation. Chester commented that "the general state of feeling among the Cherokees" was "a strong aversion to a removal," but he believed that "if Mr. Ross can be brought to exert himself in favor of a treaty, I flatter myself the result will be favorable."[22]

Chester's misperception of the chief's attitude is inexplicable; he should have been better informed about Ross's state of mind after working with him for several months. The next day, the lawyer revealed the government's proposition to the principal chief and the Cherokee National Council. By now, Ross had learned, perhaps from Wirt, that Chester had "defected," as one scholar put it, to the proremoval side.[23] After learning of Chester's appointment as a U.S. agent, Ross called the arrangement "uncouth." According to Ross, when he met with the lawyer, Chester denied having switched sides and "boldly declared that he was acting under the special advice and influence of sincere friends of the Cherokees in Congress." Chester's fundamental argument to Ross (one consistent with the Jackson administration's public and private actions) was that the Cherokee leadership could prevent great hardship by removing from the Southeast. Chester urged the chief to reconsider his entrenched position and told him that the federal government could not restrain the "vulgar populace" in Georgia from either intruding into Cherokee territory or attacking the Indians outright. Like many others before him, Chester told Ross that removal was the only viable solution to the Cherokees' difficulties. After listening to Chester's proposal, Ross and the Cherokee council responded with an insult: they demanded to see the credentials of the lawyer's appointment from the federal government. Ross told Chester that he "strenuously oppose[d] all idea of a treaty" and that most of the Cherokee Nation agreed with him. Ross added that "he would rather the government should send a force and tie them, and do what it pleases with them, than to give any assent to what he conceives must prove the destruction of his nation." Ross and the council then declared that they refused to

communicate with Chester further and would send their official rejection of the proposal directly to Cass. Despite this seemingly unambiguous rejection, Chester reported to Cass that he believed that Ross's only major objection to removal was the "want of a suitable country in the west."[24]

When freed from the misguided optimism that his reports exuded to Cass, Chester was more realistic. He now realized that it was futile to try to persuade Ross and decided that his best hope was to prevent the chief from swaying undecided Cherokees even more toward antiremoval sentiment. Chester told Cass that he thought that the Cherokees would accept removal if a prominent man described the benefits of relocation in a manner they would appreciate; he believed that the government could use gifts of reserves to bring such a leader to that point of view. Chester thus began seeking someone who could manipulate Cherokee public opinion on the removal question. The lawyer said that he hoped his friend, William Rogers, might be able to convince Major Ridge, a long-respected force in the nation, to take the lead in pressing for a removal agreement. "Notwithstanding the opposition of Ross," Chester wrote, "I think, if the nation can be assembled, that we have a prospect of success." He expressed the hope that the Cherokees could be persuaded to hold a national council on the subject at the beginning of July and declared that he intended to continue using the promise of reserves as the key to turning prominent Cherokee individuals toward removal.[25]

Chester had now permanently alienated several influential Cherokees, who believed that their nation's lawyer had become sympathetic to the Georgia removal ruffians. His actions had offended Ross in particular, and the lawyer's flirtation with the Treaty Party only exacerbated the emerging division between the two factions. Chester's move had particularly significant consequences in the all-important public relations battle that was taking place within the nation. Chester's affiliation with the Treaty Party enabled Ross adherents to portray the party as the faction of treason and betrayal; Rogers and the Ridges, the chief could argue, were connected with Chester, a manifest example of disloyalty. Chester's cocounsels in *Worcester v. Georgia*, Wirt and Sergeant, did not help the Georgia lawyer's standing with the Cherokees, for they were also convinced that their partner had abandoned his professional loyalty to the tribe and reported as much to close Ross allies. Chester even lost the confidence of a former great admirer. Samuel Worcester's wife, Ann, expressed her fears about Chester's character and the genuineness of his concern for the Cherokees in a letter to Greene. Remarkably,

despite Ann Worcester's reasonable suspicion, her husband, locked up in the Georgia penitentiary, remained loyal to Chester throughout the period of the lawyer's machinations. In June 1835, when Greene requested information on what he recalled of Chester's commitment to the Cherokees, Worcester told the board that he was "unwilling to call in question the uprightness of Mr. Chester in his intentions, and should be sorry to fail in gratitude for services rendered."[26]

On July 1, 1832, Chester wrote to Cass noting that he had left copies of the government's treaty proposal with "several persons" and predicting that a full national meeting on the subject would enable the "well-informed in the nation" to overcome the bitter opposition of Ross and the "common Indians." "There are men in the nation altogether superior to him in intelligence," Chester predicted, "who will exert themselves to make him see the true interests of the nation; and, if unsuccessful in this to put down his influence with the people." Chester completely misapprehended or misrepresented the situation on the ground in the Cherokee Nation to the War Department. On July 7, Chester provided Cass with a more sober report. He reported that the Cherokees had held a council that gave him confidence that they would eventually agree to a removal treaty. However, he feared that "it will require more time than I wished." Cass might "rest assured of every effort on [Chester's] part," but he warned that "it is not improbable that the decision of the ensuing council may be adverse to a treaty." Chester wrote that the "opinions and resolutions of a whole people cannot be instantly changed" and that the United States needed to pursue its efforts in an orderly fashion. Chester repeated that the "intelligence" of the nation had to be "secured." Subsequently, he said, "the mass must follow." Chester concluded by expressing confidence that the new council to be elected the following August would agree to a treaty. He added that he would ask the governor of Georgia to keep the Georgia Guard, which had been harassing the Cherokees for years, from "irritating the people" and promoting antagonism against the treaty advocates.[27]

Chester warned in this letter that the Cherokees were "confidently expecting a full restoration to all the rights, heretofore exercized by them, and had accustomed themselves to look to the country beyond the Mississippi, with feelings of the deepest repugnance." He said that the "intelligen[t] men" in the nation admitted that "the interest of their people demands a removal; but they cannot and dare not enter into terms, until a like conviction is produced in the minds of the populace." Chester expected this popular consensus to develop at the upcoming October council meeting, when, he

believed, a newly elected government would be more inclined to consider the removal proposition.[28]

Chester's work, however questionable in hindsight, had not been without sacrifice. At the outset of his report, he noted that he had been occupied in the previous hours with the health of one of his children. He informed Cass that he had ridden fifty miles the previous day to check on the child, who was "at the point of death." (And indeed, Chester's son died that day.) Perhaps his grief was disturbing his thinking in those sad days, for in the letter to Cass, Chester broached a spectacularly naive proposal: the government, he said, should consider the idea of removing the Cherokees clear across North America to a location near Fort Astoria, the point where the Columbia River meets the Pacific Ocean. John Robb, who was chief clerk of the department and who occasionally served as the acting secretary of war during Cass's absence from Washington, tersely deflated that grandiose plan.[29]

Despite his earlier rude reception by Ross, enough members of the Treaty Party were willing to listen to the Cass proposal to encourage Chester to continue his mission. He became friendly with John Walker Jr. and James Starr, both of whom had already advocated removal. By the summer of 1832, the disappointment of the aftermath of *Worcester v. Georgia* had induced these and other influential Cherokees, among them Andrew Ross (John's brother), William Hicks, William Rogers, and William Shorey Coodey, to join the Ridges and Boudinot in their support for a removal treaty. By this time, a small cadre of Cherokees clearly were receptive to maintaining a relationship with Chester, and the lawyer had become another point of contention between the Ross and Ridge factions. Chester wanted to control this situation, and he complained to Cass that rumors of secret negotiations among some of the Ridge dissidents and the United States had made his job of persuading the Cherokee government more difficult. Chester had reasons for maintaining confidence in his ability to produce a removal treaty. He was cognizant that the ABCFM's abandonment of its opposition to removal would affect rank-and-file Cherokees and thus expressed to Cass the expectation that the missionaries would ultimately encourage the Cherokees to embrace a removal treaty now that the headquarters had changed its position. Convincing the missionaries on the ground in the Cherokee Nation to abandon their opposition, Chester believed, would be critical to persuading the majority of Cherokees to remove; with the board in Boston giving up the fight, that chore would now be easier than might have been expected a few months earlier.[30]

Cass responded by advising Chester that if the Cherokee Nation agreed in principle to a removal treaty, federal treaty commissioners would be available to meet with leaders on October 1. On July 20, Chester passed on Cass's message to the Cherokee council. In his cover letter, Chester again expressed the reasons why he thought the Cherokees should embrace the general idea of relocation, even if their destination had yet to be determined. He held the "ardent desire" that the Cherokees "should embrace the present opportunity of escaping from evils which are hourly increasing, and from which I see not the remotest prospect of relief in their present location." He had "anxiously" desired that they "should be permitted to remain, unmolested by State authority, in the country of their fathers." He declared that he had "labored to secure for them all the rights and immunities which in times past they have enjoyed" but that he was "now driven, not to a doubtful, but certain conclusion, that a longer struggle will only increase their difficulties, and deepen their distress." He told the Cherokee council that its people could not remain prosperous and happy in the Southeast and that the U.S. government was offering them a place "where they may find a quiet home, and the enjoyment of their own laws, without danger of interference by individual States." The government was offering this place on "liberal" terms, would protect them "against hostile aggressions, and lawless intrusions," and would provide them "the means of educating their rising generation." His plea, he said, was supported by "the most distinguished friends of the Cherokees in the United States." Chester was likely referring here to the ABCFM and to those northern Whig congressmen who were sympathetic to the Cherokees but had, like the mission board, abandoned their hopes of maintaining the Indian nation in the East. "Allow me," he said, "to entreat your people not to turn a deaf ear to the counsel of friends who have stood by [the Cherokees] in every difficulty; who have long distinguished themselves by an ardent zeal in their cause, and by the highest efforts for their welfare, and who now, with one voice, advise them to accede to the beneficial terms proposed to them by the Government." These friends, he concluded, had determined that the Cherokees' "happiness, nay, their safety and political existence, depend upon the decision they may now make."[31]

On July 23, 1832, the Cherokee Nation met in council in Red Clay, just across the Tennessee border from Georgia, to consider formally the removal proposal Chester had delivered from Washington several weeks earlier. The council did not respond favorably to the lawyer's gentle words. Although several members of the Treaty Party spoke in support of relocation,

the Cherokee people rejected the proposal. A few days later, Chester issued another offer to the Cherokees. The government would be willing to draw up and sign a removal treaty that would not be binding on the Cherokees until they had the opportunity to explore the land set aside for them beyond the Mississippi.[32]

Ross responded the same day with a demand that Chester offer proof that his authority to speak for the U.S. government had been extended and was still valid. Chester had so infuriated Ross with what he saw as treachery that the chief responded to every one of the lawyer's entreaties with suspicion and insult. The correspondence between the two followed a pattern. Chester offered obsequious pleas for Ross to consider the government's removal proposals; the chief ignored the lawyer's diplomatic niceties and responded with sarcastic or condescending challenges to the lawyer's authority. In this case, when Chester responded that he continued to have authority to speak for the U.S. government, Ross replied that the Cherokee Nation had delivered its response to the government's proposal to its regular agent. Ross refused to negotiate in person with Chester or treat him as a bona fide representative of the United States, even though the two men were working within yards of each other at the Red Clay council grounds. On July 31, the chief and the lawyer exchanged another series of petty notes on the subject of whether Chester was a legitimate representative of the government and could accept the Cherokee Nation's response. Chester asked whether Ross and the national council were intentionally treating him with disrespect. Ross responded that the council intended no disrespect and then lectured Chester about how the Cherokee Nation communicated in an official fashion with the United States. The government would eventually conclude a removal agreement with the dissident Treaty Party of Cherokees, but it is clear from the record that Chester never came close to reaching an accord with the Ross faction. Chester was the wrong man with the wrong reputation at the wrong time. Moreover, the War Department never received from Chester an accurate characterization of his negotiations with Ross; the lawyer's reports were always overly optimistic, if not outright deceptive, about the status of their relationship. Consequently, the Jackson administration perhaps determined from Chester's failures that negotiations with Ross were useless, perhaps a primary reason why the government finally resolved to negotiate a treaty with the dissident party.[33]

Chester reported that passions were so high among the Cherokees that the leadership would not listen to a reasonable argument, that "men of in-

fluence" were working to reverse attitudes in the nation, and that he expected that the council might come to a different conclusion at its next meeting in October if these men stepped forward to make a stand in favor of removal. In one district of the nation, he added, he had heard that a majority of the Cherokees favored relocation.[34] Chester ended the letter with a long appeal for the government to continue its efforts to conclude a removal treaty, and he offered to continue to work as the agent for the government or to assist a new appointee if the department thought one necessary. The secretary of war responded with a brief conciliatory note: "Although unsuccessful, your efforts appear to have been constant, judicious, and calculated to give effect to the objects of the government."[35]

On August 6, Ross and the National Council finally sent a letter to the War Department responding to Cass's proposal. "It is with much astonishment," the council wrote, that "the President has been informed that a change had probably taken place in the sentiments of this nation" and that treaty propositions from the government "would be favorably received." Along with another protest of Georgia's intrusions into Cherokee territory, Ross and the council made it clear once again that the nation had no intention of signing a removal treaty. Included among the signatures and marks of the national council were not only those of Ross and the fierce opponents of removal but also those of John Ridge and Major Ridge. At this point, the two leaders of the Treaty Party continued to hold, publicly at least, with the national opposition to Cass's offer.[36]

On August 11, Chester explained why the Ridges and their allies had rejected the removal proposal. They had not accumulated enough support to break formally with the government and likely feared reprisals. Chester said that the Cherokee council had voted unanimously against the federal removal proposal and that the "bitterness against those who favored a treaty" was so great that he "thought it not advisable to be seen much in conference" with them. When he arrived at the council grounds, Chester said, he had found nailed to a tree a copy of a letter from Representative Daniel Newnan of Georgia that discussed offers of reserves to leaders who would support a removal proposal. The opponents of removal decried the "bribery" and used the letter to raise national antagonism against the supporters of the proposal.[37]

Cherokee proponents of removal tried to defend themselves against the charge, Chester reported, but agreed that it was no time to push their point of view against such an antagonized body. Some Cherokees, Chester said,

supported the removal proposal but "lacked the firmness necessary to resist the outcry against such a measure." Chester again reported that a change of opinion could come quickly among the Cherokees once the "intelligent men" of the nation were able to get their point of view heard by a more quiescent council. Perhaps that time would come after the elections and at the next council meeting in October. Chester added that some Cherokee leaders, including Ross, continued to hold out hope that the *Worcester* case might convince the federal government to intervene on the Cherokees' behalf. He suggested that the opposition to removal might be vitiated somewhat if the governor of Georgia could be persuaded to release the imprisoned missionaries and thus end the possibility that the federal government might intervene in the Georgia-Cherokee conflict. (Governor Lumpkin disagreed with Chester's strategy and refused to release the missionaries for several more months.) Chester also recommended that the U.S. government abandon its practice of providing material incentives such as reserves to individual Indians who agreed to remove. This approach, he argued, was diminishing the rump of support for removal within the nation because those in favor of relocation were simply accepting reserves and leaving for the West, leaving behind only opponents of removal. Instead, he suggested, the United States should work toward a wholesale removal of the entire Cherokee Nation. Chester encouraged the War Department to send a party of Cherokees to the West to inspect the territory that they would receive in an exchange. The government should select men who opposed a removal treaty, he wrote, and have them guided by an agent who would be able to "change their opinions, and remove their prejudices." In closing, Chester wrote that he "shall now consider my agency as at an end, unless otherwise instructed." "I regret it," he said, "because I had hoped to see the Cherokees immediately rescued from impending ruin, and our country relieved from a very serious difficulty."[38]

On August 22, Chester wrote to Edward Everett, a Massachusetts congressman who supported the idea of Cherokee removal, about the council's rejection of his proposal. An "ill temper" existed among the Cherokees, Chester said, and they were refusing to listen to removal arguments offered by either the government or "their friends." Everett "might reasonably expect that I should abandon the case as hopeless," but Chester believed that if the government followed "his course," it could secure a removal treaty "in a few months." Chester explained that "no inconsiderable number of those whose character stand high in the nation for intelligence and devotion to their Country openly espouse a removal, as the only means of preserving

either their personal or national rights." However, Chester wrote, the optimism raised by the *Worcester v. Georgia* decision had reinvigorated Cherokee opposition to any removal proposals and had antagonized the populace against those who had proffered the government's removal offer. Chester had faith that removal proposals would be listened to with more favor once the furor over the *Worcester* decision had abated.[39]

Chester then told the congressman that he did not think there was anything that could be done to preserve the Cherokees' property rights in the South. The state of Georgia was preparing for its land lottery, he noted, and he predicted that no president would attempt to reverse the course of the lottery once tickets were distributed and possession taken by the Georgia residents. As much as he respected Henry Clay and hoped for his election, Chester wrote, he did not see how Clay would be able to intervene in the dispute, inasmuch as the surrounding southern states were itching for an opportunity to abandon the Union. Demagogues in Georgia, Chester warned, were trying to stir up animosity against northern manufacturing interests and the federal government and were attempting to forge a union with nullifying elements in South Carolina. If a new administration under Clay attempted to protect the Cherokees and forestall Georgia's planned lottery of Cherokee lands, Chester warned, it would promote, and perhaps bring about, disunion.[40]

Chester then wrote to the secretary of war with new advice on how to secure a removal treaty. First, he advised sending an agent or commissioner to the October Cherokee National Council meeting with authority to negotiate preliminary removal conditions. The U.S. agent should attempt to persuade the Cherokees to agree on removal, he again suggested, on the condition that they were satisfied with the land offered in exchange. The Cherokees should then be persuaded to send "an exploring party to visit and examine minutely the Arkansas country." If the Cherokees found the land acceptable, Chester wrote, a removal arrangement could be forged. From that point forward, the Cherokee people would no longer be concentrating on how to oppose removal and instead would be planning for an impending relocation. Chester again offered his assistance to the War Department to help bring about a removal treaty, despite the fact that the Cherokees had so clearly rejected his entreaties.[41]

In September, John Robb, serving as acting secretary of war, instructed Chester to attend the October meeting and try to persuade the council to accept Cass's removal proposal. Robb's choice of Chester indicated how suc-

cessfully the lawyer had misled the War Department about his relationship with Ross. Chester agreed to deliver the proposal, which now offered the Cherokees the right to cancel any agreement if they did not like the territory set aside for them in the treaty. Chester made his last formal argument on behalf of removal in an October 16 letter to Ross. He pleaded with the chief to consider the War Department's proposal so that the Cherokees "can be rescued from the power of Georgia and other adjoining states." Ross once again dismissed Chester and replied that the Cherokees had appointed a delegation to Washington to discuss "all subjects relative to the interests of the nation." When Chester wrote back that Ross had failed to respond to the federal government's proposal, Ross responded with the condescension that had consistently marked his recent communications with the lawyer: "My letter to you in compliance with the request of the General Council informs you, that the delegation will attend to the business of this nation, before the Government of the United States, on all subjects relative to the interests of the nation."[42]

The Cherokee Nation had again rejected the federal proposal, and according to one source, Ross had "barely listened" as Chester spoke to the Cherokee council. Although Chester remained in the nation for some time thereafter, attending council meetings and working to persuade individual Cherokees of the necessity of removal, he ultimately failed and finally gave up his on efforts to unite the Cherokee Nation behind one relocation policy. He realized after months of effort that the removal opponents among the Cherokees, who numbered all but a few of the tribe's population, were disgusted with the lawyer and ready for him to leave.[43]

On February 2, 1833, Cass wrote to Ross and the rest of the Cherokee delegation and informed them that President Jackson was disappointed in their refusal to sign a removal treaty. Cass briefly mentioned Chester's role in the negotiations. The War Department, he said, had appointed Chester to "communicate the wishes of the department." "The result," Cass wrote, "was fruitless." Thus ended Chester's role in the Cherokee removal negotiations.[44]

Why was Chester so adamant about securing a removal treaty between the United States and the Cherokee Nation? No clear answer is manifest. First, there exists the unseemly possibility that the lawyer was acting solely for material reasons. Chester admitted to friends that his representation of the Cherokees had cost him clients in Georgia, and he likely needed to find a source of income to replace that business. Chester certainly would have been handsomely rewarded by the U.S. government if he had arranged

a removal agreement. Moreover, Chester apparently dabbled in land and debt speculation during his time in Georgia and over the rest of his life. In 1827, for example, Chester secured a winning draw in the Georgia lottery of Creek lands acquired in the Treaty of Washington, a fact that might help explain Chester's later dealings with the Cherokees. Perhaps Chester saw the removal of the Cherokees as offering opportunities for further speculation, if not for himself, then at the least for potential clients. Chester's office and residence abutted the Cherokee Nation's territory. A removal would have produced a boom in speculation in territory west and northwest of Chester's law office. The fact that gold was being mined in the nation certainly would not have inhibited one interested in speculation. Chester, in short, was propitiously located for a financial windfall if he could orchestrate a removal of the people who lived in that region.[45]

There is other evidence that Chester was motivated by financial considerations. By the end of his dealings with the Cherokees, some among the ABCFM had become extremely suspicious of the lawyer. William Potter, a missionary to the Cherokees who had remained in constant contact with Worcester and Butler while they were imprisoned, charged that Chester had purloined a document that would have been helpful to the missionaries' case. According to Potter, "We have all lost confidence in the man and with the approbation, and at the request of Messrs. Worcester & Butler[,] I have informed him that his presence will probably not be needed at Washington" to handle any future proceedings before the Supreme Court. Potter added, "He has as far as I can learn the confidence of no party in the state of Ga. And is making his arrangements to remove to Ohio." "Mr. Ross is clearly of the opinion that he should not be employed anymore," Potter wrote, "and that Mr. Underwood [Chester's partner] ought to be requested to go to [Washington] so as to be there at the Court."[46]

Potter's testimony about Chester, however, was not devoid of complications. Almost three years after Chester's unceremonious release from his responsibilities, the lawyer attempted to collect fees for his services from the ABCFM. Greene contacted Potter to secure his opinion on if, and how much, Chester ought to be paid. Potter wrote that Chester had mishandled his responsibilities in the case and that he had acted in contradiction to Wirt's instructions. "The truth is," Potter wrote, "he was considered as having taken a fee from both sides and of course he lost confidence with both parties, and I believe deserves the execration of all good men." Chester had indeed received at least thirteen hundred dollars from the United States in 1833. It ap-

pears, however, that Potter had self-interested reasons to impugn Chester's character. Potter had wanted to be the Cherokees' representative to attend the Supreme Court proceedings in Washington. When Chester secured that appointment, Potter may have become embittered, and the questions about Chester's role and his fee would have given Potter an opportunity to exact a small measure of revenge.[47]

Greene had also written to Elizur Butler to inquire about the quality of the lawyer's work and about the amount of time he spent on the case. Butler responded that Chester had worked on the case between January and May 1832. He suspected, however, that Chester must have been in the employ of the U.S. government during that same time. (In fact, Chester had not approached the secretary of war until after the U.S. Supreme Court's decision in *Worcester*.) Butler said that he was convinced that Chester had acted dishonestly and pursuant to his own material interests and added that after Chester returned from Washington after the Supreme Court's decision, he had come to fear that the lawyer "was not faithful to his clients and that his great object there was to close the case in a way to promote his own interests." Moreover, according to the doctor, "Other members of the mission were of the same opinion and I know of no one who has since changed his opinion on the subject." Butler reported that Chester had admitted to the missionaries while they were in the penitentiary that the secretary of war had offered to pay the missionaries' legal expenses, in an "article without specification," if the Cherokees signed a removal treaty. Chester also told them at the time that he would receive twenty-five hundred dollars if he were able to bring about a removal agreement. This was damning evidence for those disposed to suspect the lawyer of betrayal.[48]

However, Worcester remained loyal to Chester, and Chester had befriended a number of Cherokees over the months he had represented the nation and its citizens in their legal affairs. He talked more than once in his letters about confidential conversations with leading Cherokee men. More than likely, he had become friends with some of those among the Cherokees who had accepted removal as the nation's only alternative. In addition, it is clear that Chester was terribly frustrated with the state of affairs in Georgia. He believed the removal proponents had become irrational in their desire to expel the Cherokees and feared that the Indians might be destroyed if they continued their resistance. He also apparently believed that whether Jackson or Clay was elected president in the fall of 1832, neither would intervene on the Cherokees' behalf. Since his participation in the *Worcester* case,

Chester had perhaps worked the Cherokees' alternatives through his mind and had determined that there was no possibility that the Cherokees could remain safely and securely in their homeland and that removal was indeed their best chance for a return to security and prosperity. His "betrayal" of the Cherokees—offering his services to the U.S. government as a treaty agent—may have been motivated simply by his sense that he was in the best position to serve as a mediator who would be genuinely concerned with the Cherokees' best interests. As he wrote to Everett in the late summer of 1832, "Standing in the relation that I do, known not to belong to the party by which the present administration is supported," he was situated to persuade the Cherokees toward removal. The government's objective, he added, would not be achieved by someone who was not "well-acquainted with the situation, feelings, & character of the people, and without confidential friends among them, to manage the matter to the best advantage." Of course, it is entirely possible that Chester was animated by both honorable and material motives. Perhaps he did believe that the Cherokees' best fate resided with a removal to the West; the fact that the United States was willing to pay him as an agent to bring about a relocation was simply a fortuitous—and tempting—bonus to his own moral or political inclinations. In any event, by early 1833, Chester was ready to abandon his work in Georgia. In his letter to Everett, Chester despaired about the political situation in the South and told him, "I am in hopes to find myself settled in a more sober region (Cincinnati) . . . in the next spring, where my cares may have a little respite from the din about Indian lands and the Tariff."[49]

Georgia and the United States continued to increase the pressure on the Cherokees to remove after Chester's resignation, and the Cherokee Nation became even more divided between the thousands who wanted to continue to resist and the smaller group who wanted to surrender and depart for the West. In 1835 the latter group, led by the Ridges and Boudinot, signed a removal treaty at the Cherokee capital. The Treaty of New Echota required the Cherokee Nation to exchange its national lands for a parcel in the recently established Indian Territory west of Arkansas. Even though the agreement was completed without the sanction of the Cherokee National government, the U.S. Senate ratified the treaty by a single vote. The treaty required the Cherokees to depart for the West within two years.[50]

When the Cherokees, most of whom signed a petition protesting the treaty, refused to prepare for removal, President Martin Van Buren sent in federal troops. In the summer of 1838, the U.S. Army and volunteers from

the adjoining states rounded up every Cherokee individual they could and interned them in concentration stockades. Over a brutally hot and dry summer, thousands of Cherokees died from disease and malnutrition. Hundreds more died on the long march to the Indian Territory over the winter of 1838–39. And the ordeal did not end when the Cherokees arrived in the territory. Over the next seven years, the "New Arrival" Cherokees were required to integrate politically with the "Old Settlers" who had moved there in previous migrations. Moreover, after Ross partisans killed the Ridges and Boudinot on June 22, 1839, a bitter gangland war raged between the factions until 1846, when they agreed to a general amnesty. Despite their internal differences, the Cherokees resurrected their nation, restored their national institutions, and rebuilt their economy.[51]

Just as the Cherokees had to reestablish themselves in the Indian Territory, a despondent Chester left Georgia to make his own new start. One individual familiar with Chester commented that the lawyer had "sacrificed his business and personal standing in that community" for the sake of the Cherokees, leaving the state with the "proud consciousness of having done his duty according to the principles of sound morality and law." Whether Chester actually harbored these feelings of moral contentment seems doubtful in light of his later actions. The Cherokees' former attorney apparently did everything he could to put the summer of 1832 behind him.

By 1836, Chester had moved to Cincinnati and opened a law practice. He became a public critic of slavery and joined the local abolitionist society. Little is known of the two slaves he owned in Georgia; he presumably sold them along with his home and lottery parcels before he moved. When racist mobs attacked abolitionist newspapers in Ohio, Chester spoke out as a friend "of order, of law, and of the Constitution." Inspired by the brave antislavery radicals, however, Chester soon became editor of the *Alton Observer*. Elijah P. Lovejoy, a Presbyterian abolitionist, had established the paper in St. Louis in 1836. It was, according to one authority, "moderately opposed to slavery," favoring abolition contingent on colonization. Abolitionism antagonized racists in southern Ohio and southern Illinois, however, and antiabolitionist mobs seized the paper's press and threw it into the Mississippi River. Even after the paper moved to Alton, Illinois, antiabolitionist crowds destroyed Lovejoy's press three more times. When the fourth press arrived on November 6, 1837, a racist gang dumped the press in the river and then killed Lovejoy.[52]

Chester was aware of the dangers of managing the *Observer*. In his first

issue, he lamented Lovejoy's death, revealing the degree to which he had come to admire the abolitionist: "The mind that teemed with thought, the heart that glowed with love, the soul that communed with God in the arduous work of conducting this paper, devoted to the course of religion and benevolence, no more shall enliven us with the scintillations of genius." Although he called on Alton residents to bring Lovejoy's killers to justice, Chester explained that he was moving the paper out of the town: "Until Alton shall 'come to herself' and see the injustice done to her citizens, and the citizens of the state . . . we must be content to procure the printing of the Observer from other places."[53]

Chester began producing the paper in Cincinnati at the same time that he assumed editorial responsibility for the *Cincinnati Journal and Western Luminary*, publishing similar content in the two papers. His publications focused particularly on religious subjects, and preachers and pastors from the area around Alton and Cincinnati sent in reports on revival meetings and major church events. Chester also inserted a front-page column listing news for women; what spawned his interest in the fate of women remains unclear, but from that point forward, he supported their interests. Chester also included some of the memorials published by Cherokees in their final efforts to forestall removal.[54] Chester also exhibited an interest in the religious impulses of children. Along with printing *Youth's Magazine*, he taught Sunday School at his church and occasionally directed editorial comments to his Christian charges.[55]

Chester continued Lovejoy's newspaper policy of condemning slavery. One disgruntled subscriber complained that Chester was creating discord in the Union, for the founders had affirmed slavery's legitimacy in the Constitution. Chester responded at length, noting that the Framers refused to include the word *slavery* in the Constitution, thereby indicating that they did not intend indefinitely to preserve the institution. "The Constitution," he said, "left the matter essentially where it found it, giving it no sanction and protecting it by no peculiar guaranties." The only right that was sacred was liberty, Chester declared, offering his own fundamental objection to slavery: "There is no other right to reduce men to, and hold them in bondage and as property, than a right founded on power." "Can the exercise of such a power be morally right?" he asked.[56]

Chester turned dramatically against slavery either before or immediately after he left Georgia. What caused this radical reversal? Only one answer seems reasonable: Chester was transformed while living among white

Georgians who had used skin color to judge human value. After witnessing how this white racial ideology affected his Cherokee clients, perhaps the lawyer became disgusted by it. For the rest of his life, Chester was an avid abolitionist, committed to elevating the lives of the disempowered.

Gamaliel Bailey, coeditor with James Birney of the *Philanthropist*, wrote that "Chester is sincere [in his antislavery sympathies]; we must try to keep him up to the mark." However, in April 1838, only a few months after he began printing his periodicals, Chester determined that he could no longer endanger his life, family, and livelihood in Ohio with his abolitionist endeavors. Bailey tried to keep the lawyer actively engaged in the fight. "Chester is a warm Abolitionist," he wrote, but Bailey correctly feared that Chester would sell his paper and abandon the publishing business. "I fear, very much, that he will be compelled to sell." Entering the newspaper business had forced Chester into debt; with the endeavor's failure, he suffered judgments against him, lost collateralized property, and eventually left for New York.[57]

Chester opened a Wall Street law office, where he engaged in a variety of general legal affairs from bankruptcy and estates to loan collection. Chester served as an arbiter and mediator in several cases, suggesting that other attorneys valued his fairness and wisdom. He also tried his hand at investments, buying and selling notes, trying to establish a gaslight company, and investing in a canal.[58]

Chester became active in New York City's abolitionist movement and joined the local branch of the American Anti-Slavery Society. During the *Amistad* affair, he wrote a letter to the editor of the *Emancipator*, the society's newspaper. Africans held the same rights and responsibilities as people of other races, he argued, but it was incumbent on them to abide by society's conventions. "Color," Chester wrote, "cannot alter the rights or liabilities of the accused." Behaving responsibly as moral agents, he argued, would gain them respect. Chester continued to work against slavery up to and through the Civil War, offering theological opposition to slavery with fellow abolitionists Horace Greeley and Henry Ward Beecher.[59]

Chester quickly garnered respect in various New York circles, apparently using his participation in *Worcester v. Georgia* as a symbol of his ability and integrity. Chester's notoriety enabled him to achieve political influence as well. His activism was inspired by his evangelical reform sentiments. In 1843, he led the American Republic Association, a fledgling political party and precursor to the nativist Know-Nothing Party. On December 28 of that

year, he gave a bitter anti-Catholic speech to the city's Seventh Ward, condemning the church while publicizing his new party. Although he acknowledged the principle of the separation of church and state, he called for the U.S. government to provide free Protestant Bibles for all public school students. Children needed Protestant instruction, he said, to protect the nation from "the domineering power and arrogance and wickedness of the Pope and the Vatican."[60]

Chester also called for the government to limit the "moral leprosy" of German and Irish Catholic immigration into the country. "We have seen," he declared, "foreigners by hordes . . . under priestly influence, carried blindfold into the arena of party strife, and turning the scale of our elections between two contending parties." Professional political managers manipulated immigrants for the parties, he complained, and the existing parties were running the city into default, raising taxes beyond reason, and corrupting the police. The American Republic Association, he declared, was ready to "explore, root out, and destroy the system of misrule, abuse and corruption, which have so long held their court and rioted in our city government."[61]

Chester eventually abandoned these associations and concentrated his time on religious and philanthropic causes, including the Prison Association of New York, the Broadway Tabernacle Church (the oldest Congregationalist church in the city), and writing for Christian journals. Most of his writings were based on biblical stories, but in at least one case he condemned how the working classes suffered under industrialization. After reading Charlotte Elizabeth's *The Wrongs of Woman*, which described how women were being treated in industrializing England, Chester added the plight of working-class women to the causes on behalf of which he worked for the rest of his life. In his review of Elizabeth's book, Chester commented on industrialism in the United States, "It is true that our large manufacturing establishments afford to their operatives a liberal reward . . . but in some of our large cities evils and want exist sickening to the heart of the philanthropist." Chester then described the meager wages paid to a seamstress in New York City.[62]

Chester did more than simply lament the status of women. With his wife, he supported female societies, including the ABCFM's Women's Board of Missions. He served on the board of managers and executive board for the American Female Guardian Society, where he oversaw construction of a House of Industry and Home for the Friendless. His wife served on the society's finance, industrial school, and publishing and printing committees, and the couple regularly donated money and food to the group. His char-

ity was not limited to corporate groups. During the Civil War, Chester assumed financial responsibility for the wife and child of a law partner who enlisted in the 71st New York Infantry Regiment.[63]

Chester was especially admired by New York's sailors, who often turned to him for legal advice. His served as a trustee of the American Seamen's Friends Society and helped set up a boardinghouse for homeless sailors. After his death on May 18, 1873, the society published a resolution stating that Chester had "greatly assisted in public and christian endeavors" on behalf of sailors. In a memorial that accompanied the resolution, the society's journal, the *Sailors' Magazine and Seamen's Friend*, recounted Chester's representation of the Cherokees and reported that "in the city of New York, where he had the matter in charge of protecting seamen against the robbery and ruin of sailor-landlords, he showed the same moral courage and adhesion to Christian duty." In language that seems ironic in hindsight, the journal then described the reputation that Chester had developed in the city: "As a lawyer, he always repudiated the principle too commonly adopted in practice, that an attorney is bound to defend his client irrespective of all moral considerations, and always insisted that while defending his client according to law, if, by technical quibbles and tricks, he aids rascality to escape the penalty of law, he degrades his own manhood, and disgraces his noble profession." "His associates in business and Christian work valued his sound judgment, his correct principles, and cordial cooperation," the journal concluded, and "now pay their humble tribute to the worth and usefulness of a good man."[64]

In a complex life marked by efforts to aid the subjugated and oppressed, it is difficult to explain why Chester promoted a removal treaty in 1832. At the time, he was a relatively young lawyer, and American legal ethics were as vague and unformed as was the nation. One could speculate that Chester failed to appreciate the loyalty demanded by a client. He certainly did not recognize the concept of the appearance of impropriety that became a fundamental principle of twentieth-century legal ethics. Chester's great mistake was failing to consult Cherokee leaders about his intentions to mediate between their nation and the U.S. government. Chester's actions were not a proximate cause for the removal of the Cherokees; however, his poor judgment exacerbated tensions between the Ross faction and the Treaty Party after *Worcester*. Chester's disingenuousness with the War Department about the dismal state of his relationship with Ross also persuaded the U.S. government to focus its efforts on the Ridge dissidents. Finally, his abandon-

ment of Ross's opposition to removal and success in convincing the ABCFM to join in what the chief deemed a betrayal accelerated the dissolution of the opposition to removal in the North and among anti-Jackson forces in Congress. These were challenges that the Cherokee Nation, whose people desperately wanted to remain in their homeland, did not need and were unable to overcome.

NOTES

1. *Advocate of Moral Reform*, August 15, 1841, 125.

2. *Worcester v. Georgia*, 31 U.S. 515 (1832).

3. "In Memoriam," *Sailors' Magazine and Seamen's Friend* 45–46 (1873): 215–16; S. A. Worcester to David Greene, August 4, 1831, American Board of Commissioners for Foreign Missions Archives (ABCFM Archives), Houghton Library, Harvard University, ABC 18.3.1, 7:147; U.S. Census, 1830, Gwinnett County, Georgia, County 28, p. 351; Don L. Shadburn, *Unhallowed Intrusion: A History of Cherokee Families in Forsyth County, Georgia* (Alpharetta, Ga.: Wolfe, 1993), 218; Samuel Carter III, *Cherokee Sunset, a Nation Betrayed: A Narrative of Travail and Triumph, Persecution and Exile* (Garden City, N.Y.: Doubleday, 1976), 120; J. C. Flanigan, *History of Gwinnett, Georgia, 1818–1960* (Chelsea, Mich.: Bookcrafter's, 1959); An Act to Establish Free Schools in the County of Gwinnett, in *Acts Passed by the General Assembly of the State of Georgia, 1826* (Milledgeville, Ga.: Camak and Ragland, 1826), 16.

4. Clarence E. Carter, ed., *The Territorial Papers of the United States* (Washington, D.C.: U.S. Government Printing Office, 1934–62), 5:142–46; Tim Alan Garrison, "United States Indian Policy in Sectional Crisis: Georgia's Exploitation of the Compact of 1802," in *Congress and the Emergence of Sectionalism: From the Missouri Compromise to the Age of Jackson*, ed. Paul Finkelman and Donald R. Kennon (Athens: Ohio University Press, 2008), 97–132; Charles Joseph Kappler, ed., *Indian Affairs: Laws and Treaties* (Washington, D.C.: U.S. Government Printing Office, 1903–29), 2:8–16, 31; Tim Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* (Athens: University of Georgia Press, 2002), 3, 54–57, 103–8, 151–52, 168, 204–5. Rogers, who signed the Treaty of New Echota, remained loyal to Chester even when many Cherokees began to question the lawyer's motives after the *Worcester* decision. See Shadburn, *Unhallowed Intrusion*, 138, 230–31.

5. *Acts of the General Assembly of the State of Georgia*, December 11, 20, 1830 (Milledgeville, Ga.: Camak and Ragland, 1831); *Cherokee Nation v. Georgia*, 30 U.S. (5 Peter) 1, 17–18, 20 (1831); Garrison, *Legal Ideology of Removal*, 150.

6. Garrison, *Legal Ideology of Removal*, 169–74; Jill Norgren, *The Cherokee Cases: The Confrontation of Law and Politics* (New York: McGraw-Hill, 1996), 113; S. A. Worcester to David Greene, August 4, 1831, ABCFM Archives, ABC 18.3.1, 7:147.

7. S. A. Worcester to David Greene, September 16, 1831, ABCFM Archives, ABC 18.3.1, 7:157; David Greene to E. W. Chester, October 25, 1831, ABCFM Archives, ABCFM 101.1, 11:327.

8. David Greene to E. W. Chester, October 25, 1831, ABCFM Archives, ABCFM 101.1, 11:327–28.

9. Ronald A. Berutti, "The Cherokee Cases: The Fight to Save the Supreme Court and the Cherokee Indians," *American Indian Law Review* 17, no. 1 (1992): 300–303.

10. David Greene to E. W. Chester, February 9, 1832, ABCFM Archives, ABCFM 1.01, 11:439; *Worcester v. Georgia*, 534–35, 542.

11. Affidavit of William H. Underwood, Elisha W. Chester, and Edward Harden, March 17, 1832, ABCFM Archives, ABC 18.3.1, 7:187; S. A. Worcester to David Greene April 4, 1832, ABCFM Archives, ABC 18.3.1, 7:167; Norgren, *Cherokee Cases*, 113, 115, 122; Edwin A. Miles, "After John Marshall's Decision: *Worcester v. Georgia* and the Nullification Crisis," *Journal of Southern History* 39, no. 4 (1973): 519–44.

12. Elisha W. Chester to Wilson Lumpkin, April 4, 1832, ABCFM Archives, ABC 18.3.1, 7:185; S. A. Worcester and E. Butler, Memorial to the President of the United States, ABCFM Archives, ABCFM 1.3.1, 1:25.

13. S. Doc. 512, 23rd Cong., 1st sess. (1833), 816–17; Thurman Wilkins, *Cherokee Tragedy: The Ridge Family and the Decimation of a People* (1970; Norman: University of Oklahoma Press, 1986), 239; Garrison, *Legal Ideology of Removal*, 125. A Cherokee delegation was present in Washington, D.C., at the time of Chester's approach to the government. John Ridge had an audience with President Andrew Jackson, who told Ridge that the government would not intervene in the Cherokee crisis. Jackson also advised Ridge to go home and convince his fellow Cherokees to remove to the West. According to at least one authority, this was the moment at which Ridge began to abandon his opposition to removal and began to work toward the realization of a removal treaty. See Gary E. Moulton, *John Ross: Cherokee Chief* (Athens: University of Georgia Press, 1978), 48; Wilkins, *Cherokee Tragedy*, 236–37.

14. Norgren, *Cherokee Cases*, 124–25; David Greene to Elizur Butler, April 15, 1832, ABCFM Archives, ABCFM 1.01, 14:118–19. On April 17, Daniel Newnan, a Georgia congressman who, like Chester, was trying to orchestrate a relocation agreement, was unaware that the Cherokees' lawyer had made arrangements with the War Department when he wrote to Cass that Chester was in Washington. "I have not ascertained," Newnan wrote, "whether or not, he is at present engaged in giving good or bad advice to these deluded people." Newnan added that he had heard that "certain persons" were "advising the Indians to take reserves extensively; with a view of creating embarrassments with Georgia and the General Government." Newnan was implying that Chester was attempting to persuade Cherokee leaders to sign a removal treaty by offering them the opportunity to retain large tracts of land. Such a plan would have antagonized those removal proponents who were motivated more by racist than speculative motives—that is, those individuals who wanted all Indians expelled from the South. After raising questions about Chester's reliability, Newnan suggested that the government try to persuade Supreme Court Justice John McLean to manage the removal negotiations with the Cherokees. See Daniel Newnan to Lewis Cass, April 17, 1832, in *Correspondence on the Subject of the Emigration of Indians* (Washington, D.C.: Duff Green, 1835), Senate Doc. 512, 3:296–97.

15. David Greene to E. W. Chester, April 25, 1832, ABCFM Archives, ABCFM 1.01, 11:534–36.

16. Elisha W. Chester, "Reasons Why the Cherokees Should Make a Treaty *Now*," May 1832, ABCFM Archives, ABC 18.3.1. vol. 7, item 187.

17. Ibid.

18. Ibid.

19. David Greene to Rufus Anderson, May 1, 1832, ibid., ABC 11, 4:78.

20. David Greene to Theodore Frelinghuysen, May 2, 1832, ibid., ABCFM 1.01, 11: 545–47.

21. David Greene to John Ridge, May 3, 1832, ibid., ABC 18.3.1, 7:188.

22. E. W. Chester to Lewis Cass, May 30, 1832, in *Correspondence on the Subject of the Emigration*, 3:365–66.

23. Moulton, *John Ross*, 48–49.

24. Norgren, *Cherokee Cases*, 125; Kenneth Penn Davis, "Chaos in the Indian Country: The Cherokee Nation, 1828–35," in *The Cherokee Indian Nation: A Troubled History*, ed. Duane H. King (Knoxville: University of Tennessee Press, 1979), 137. Readers might find it striking that Chester carried out such delicate diplomatic work in writing. There are likely two reasons for this: first, Ross, who was suspicious of Chester at first and later hostile to him, insisted on formality and may have refused to discuss removal with the lawyer in person. Second, Chester may have decided that he needed to record his actions to justify his work with the War Department. The records of these negotiations are held in U.S. repositories, suggesting that Chester forwarded copies of his correspondence with Ross to Washington.

25. E. W. Chester to Lewis Cass, June 9, 1832, in *Correspondence on the Subject of the Emigration*, 3:372–73.

26. Wilkins, *Cherokee Tragedy*, 245; S. A. Worcester to David Greene June 17, 1835, ABCFM Archives, ABC 18.3.1, 9:65; Ann Worcester to David Greene, September 19, 1832, ABCFM Archives, ABC 18.3.1, 7:178.

27. E. W. Chester to Lewis Cass, July 1, 7, 1832, in *Correspondence on the Subject of the Emigration*, 3:389, 391–92.

28. Ibid.

29. For a full discussion of Chester's Columbia River scheme, see Tim Alan Garrison, "Cherokees on the Columbia? Elisha W. Chester's Quixotic Removal Plan," *Columbia* (forthcoming).

30. Wilkins, *Cherokee Tragedy*, 243–45; Grace Steele Woodward, *The Cherokees* (Norman: University of Oklahoma Press, 1963), 171–72.

31. Lewis Cass to Elisha W. Chester, July 14, 1832, in Senate Document 512, 23rd Cong., 1st Sess., *Letters from Agents and Others Concerning Cherokee, Ohio Indians, Choctaw, Menominees, Indians of Michigan*, 2:18; E. W. Chester to Lewis Cass, July 1, 1832, in *Correspondence on the Subject of the Emigration*, 3:424–25.

32. Wilkins, *Cherokee Tragedy*, 243–45.

33. Letters between E. W. Chester and John Ross, July 31, 1832, in *Correspondence on the Subject of the Emigration*, 3:425–27.

34. This was highly unlikely considering that three-quarters of the nation signed a petition protesting the Treaty of New Echota.

35. Elisha W. Chester to John Robb, August 16, 1832, John Robb to E. W. Chester, September 14, 18, 1832, in *Correspondence on the Subject of the Emigration*, 3:431–33, 2:3.

36. Cherokee National Council, Red Clay, August 6, 1832, in ibid., 3:418–19.

37. E. W. Chester to Lewis Cass, August 11, 1832, in ibid., 3:421–24.

38. E. W. Chester to Lewis Cass, August 11, 1832, Wilson Lumpkin to Lewis Cass, September 22, 1832, in ibid., 3:421–24, 460–61.

39. E. W. Chester to Edward Everett, August 29, 1832, ABCFM Archives, ABC 18.3.1, 7:188.

40. Ibid.

41. Ibid.

42. John Robb to E. W. Chester, September 14, 18, 1832, E. W. Chester to John Robb September 29, 1832, Exchange of Letters between E. W. Chester and John Ross, October 16, 30, 1832, in *Correspondence on the Subject of the Emigration of Indians*, 2:21–22, 25, 3:512, 520–22.

43. E. W. Chester to John Robb, October 27, 1832, H. Montgomery to Lewis Cass, October 31, 1832, in *Correspondence on the Subject of the Emigration of Indians*, 3:510–11, 513; Wilkins, *Cherokee Tragedy*, 247; Moulton, *John Ross*, 49; Davis, "Chaos in the Indian Country," 139; Shadburn, *Unhallowed Intrusion*, 230–34.

44. Lewis Cass to John Ross et al., February 2, 1833, in *Correspondence on the Subject of the Emigration of Indians*, 3:588–89.

45. Martha Lou Houston, comp., *Reprint of Official Register of Land Lottery in Georgia, 1827* (Easley, S.C.: Southern Historical Press, 1986).

46. W. M. Potter to David Greene, November 30, 1832, ABCFM Archives, ABC 18.3.1., 8:13.

47. W. M. Potter to David Greene, May 26, 1835, ibid., ABC 18.3.1, 8:21.

48. Elizur Butler to David Greene, May 28, 1835, ibid., ABC 18.3.1, 7:308–10.

49. E. W. Chester to Edward Everett, August 29, 1832, ibid., ABC 18.3.1, 7:188.

50. For a history of the Treaty of New Echota, see Wilkins, *Cherokee Tragedy*, 264–90.

51. For conditions on the Trail of Tears, see Theda Perdue and Michael D. Green, *The Cherokee Nation and the Trail of Tears* (New York: Viking, 2007); Tim Alan Garrison, "On the Trail of Tears: Daniel Butrick's Record of the Removal of the Cherokees," in *Removing Peoples: Forced Removal in the Modern World*, ed. Richard Bessel and Claudia B. Haake (Oxford: Oxford University Press, 2009), 35–78.

52. "In Memoriam," 216; S. A. Worcester to David Greene, June 17, 1835, ABCFM Archives, ABC 18.3.1, 9:65; William Birney, *James G. Birney and His Times* (New York: Appleton, 1890), 248; *Narrative of the Late Riotous Proceedings against the Liberty of the Press, in Cincinnati* (Cincinnati: Ohio Anti-Slavery Society, 1836), 42; Wesley Norton, *Religious Newspapers in the Old Northwest to 1861: A History, Bibliography, and Record of Opinion* (Athens: Ohio University Press, 1977), 114–15.

53. *Alton Observer*, December 28, 1837.

54. Ibid., December 28, 1837–April 12, 1838.

55. Ibid., January 4, 1838.

56. Ibid., February 22, 1838.

57. One source reports that Chester lost seventy-five hundred dollars on the newspaper venture. See Norton, *Religious Newspapers*, 26. See also Gamaliel Bailey to James Gillespie Birney, August 28, 1838, in *Letters of James Gillespie Birney, 1831–1857*, ed. Dwight L. Dumond (Gloucester, Mass.: Smith, 1966), 258 n. 3; Franklin William Scott, *Newspapers and Periodicals of Illinois, 1814–1879* (Springfield: Illinois State Historical Library), 5; *American Children's Periodicals, 1789–1872*, http://www.merrycoz.org/bib/1840.htm (accessed June 19, 2010); *Loring v. Melendy*, 11 Ohio 355–58 (1842); James Gillespie Birney, Tappan College, to Lewis Tappan, Cincinnati, July 29, 1837, Gamaliel Bailey to James Gillespie Birney, December 19, 1837, in *Letters of James Gillespie Birney*, ed. Dumond, 400, 435–36.

58. Edwin Williams, *The New York Annual Register, 1840* (New York: Felt, 1840), 436; *A. E. Wright's Boston, New York, Philadelphia, Baltimore, and Washington Commercial Directory and Advertising Medium* (New York: Wright, 1840), 168; James Barr Ames, *A Selection of Cases on the Law of Bills and Notes and Other Negotiable Paper* (Cam-

bridge: Harvard Law Review Publishing Association, 1894), 793; *Advocate of Moral Reform*, July 1, 1841, 101; *Documents of the Board of Aldermen of the City of New York* (New York: McSpedon and Baker, 1853), xx, pt. 1, pp. 339–41. For a brief exemplifying Chester's rhetorical tendencies, see E. W. Chester, *Supreme Court of the State of New York: Francis O. J. Smith against Ezra Cornell* (New York: Hart, 1871).

59. "The Cincinnati Gazette," *Emancipator*, September 26, 1839, 87; "Annual Report of the American Anti-Slavery Society," *Evangelical Magazine and Missionary Chronicle* 39 (January 1861): 598.

60. E. W. Chester, *Address of E. W. Chester, Esq., Delivered to the American Republican Association of the Seventh Ward, in New York* (New York: American Republican Association, n.d.), 5–8.

61. Ibid., 9–15.

62. American Home Missionary Society, *The Thirty Seventh Report of the American Home Missionary Society* (New York: Gray and Green, 1863), 113; Prison Association of New York, *Eighth Annual Report of the New York Prison Association to the Legislature of the State of New York* (Albany, N.Y.: Van Benthuysen, 1853), 6; Susan Hayes Ward, *The History of the Broadway Tabernacle Church, from Its Organization in 1840 to the Close of 1900, Including Factors Influencing Its Formation* (New York: Trow, 1901), 1, 280; Joseph Parrish Thompson, *The Last Sabbath in the Broadway Tabernacle: A Historical Discourse* (New York: Calkins and Stiles, 1857), 7–8, 10–12; *A Narrative of Some Recent Occurrences in the Church of the Puritans* (New York: Dorr, 1857), 6–7, 10–13, 32, 43. For an example of how deeply Chester became involved in his church's political and theological disputes, see Finley Anderson, ed., *Proceedings of a Council of Congregational Churches* (New York: Jenkins, 1859), 13–20, 44–48, 79–84. For examples of Chester's publications, see E. W. Chester, "The Destruction of the Cities of the Plain," *Mother's Magazine, and Family Library* 11, no. 5 (1843): 110–13; E. W. Chester, "The Women at the Cross of Christ," *Mother's Magazine, and Family Library* 11, no. 6 (1843): 131–35; E. W. Chester, "Moses and Pharaoh," *Mother's Magazine, and Family Library* 11, no. 7 (1843): 145–47; E. W. Chester, "Jonah and His Gourd," *Christian Family Magazine* 2 (1843): 88–90; E. W. Chester, "Ambitious Parents," *Mother's Magazine* 12 (January 1844): 10–12; E. W. Chester, "Thy Son Liveth," *Mother's Magazine* 12 (January 1844): 21–24; E. W. Chester, "Review of *The Wrongs of Woman* by Charlotte Elizabeth," *Christian Parlor Magazine*, May 1844, 9–12; E. W. Chester, "The Threshing Floor of Ornan," *Primitive Methodist Magazine*, 3rd ser., 4 (1846): 249–51; E. W. Chester, "The Young Mother," in *The Gem of the Season for 1848* (New York: Leavitt, Trow, 1848), 155–57.

63. *The Missionary Herald* 66, no. 1 (January 1870): 39, 66, no. 5 (May 1870): 167; "House of Industry and Home for the Friendless," *Water-Cure Journal, and Herald of Reforms* 6, no. 1 (1848): 15–16; Woman's Board of Missions, *Life and Light for Heathen Women* (Boston: Rand, Avery, 1874), 3:272; *Twentieth Annual Report of the American Female Guardian Society* (New York: American Female Guardian Society, 1854), 7, 34, 39; *Directory of the Board of Education of the City and County of New York* (New York: Baptist and Taylor, 1865), 160, 173, 174; D. T. Valentine, ed., *Manual of the Corporation of the City of New York* (New York: Jones, 1866), 334–35; "List of Officers and Managers," *Advocate and Family Guardian* 38, no. 11 (1872): 129, 286–87; Benson J. Lossing, *History of New York City* (New York: Perrine, 1884), 2:463–64; S. R. I. Bennett, *Woman's Work among the Lowly: Memorial Volume of the First Forty Years of the American Female Guardian Society and Home for the Friendless* (New York: American Female Guardian

Society, 1877), 122, 153–55, 169, 175; Barbara J. Berg, *The Remembered Gate: Origins of American Feminism: The Woman and the City, 1800–1860* (New York: Oxford University Press, 1978), 232; Frank Moore, ed., *The Rebellion Record: A Diary of American Events* (New York: Putnam, 1861), 186.

64. *Thirty-Third Annual Report of the American Seaman's Friend Society* (New York: Hallet, 1861); *Sailors' Magazine and Seamen's Friend* 37 (August 1865): 292, 316.

The Material Conditions of Dependency

The Hidden History of Free Women's Control of Property in the Early Nineteenth-Century South

Laura F. Edwards

ON AUGUST 11, 1844, Elizabeth Cooley sat down to write in her diary, which she did regularly from the age of seventeen until her death at age twenty-three. That day, she and her mother had gone "to town a trading" and purchased knives and forks as well as calico to make dresses for Elizabeth and her sister, Amanda. The town was likely Hillsville, tucked into the southwest corner of Carroll County, Virginia, near the point where Tennessee, North Carolina, and Virginia meet. Given the difficult terrain of the Blue Ridge Mountains and the distance to town, shopping really was an expedition, one dependent on road conditions and the weather. The Cooley women nonetheless went to town often.[1]

This particular trip would be unremarkable if not for what Elizabeth's diary entries reveal about the reasons for it: the women in the Cooley family had a thriving textile business that included raising sheep for wool, spinning and weaving, and cutting, sewing, and fitting clothes for local men and women. The diary kept by Elizabeth's older sister, Amanda, also records the details of the business, which was headed by their mother, Jane, and included the youngest sister, Julia Ann. Amanda, Elizabeth, and Julia Ann were among the youngest of Benjamin and Jane Cooley's eleven children, four of whom were still living at home. Benjamin was a watchmaker who worked a modest farm with the help of an enslaved woman, his son, and his grandson. Yet when the Cooley women went "to town a trading," they did so with their own resources, a situation recognized by the local merchants, the community members who did business with the women, and the male members of the Cooley family.[2]

The Cooley women were remarkable only for the scale of their enterprise. Southern households were caught up in the same economic currents

that transformed the northeastern United States and Britain, as the mass production of cloth and clothing extended the Industrial Revolution's reach deep into the countryside and forever altered existing labor arrangements there. Southern women were drawn into this market by the late colonial period, and their participation in it only increased in the early nineteenth century. In this respect, they had much in common with the New England farm women who wove straw hats in their kitchens, the young female factory operatives who toiled in the Lowell mills, and the seamstresses who worked by the piece in New York City. To be sure, all these women's ancestors had performed needlework of some kind for their own families. What changed was the kind of work that they did and for whom they did it: they took on new tasks, some of which had been done previously by men, and then sold what they produced.[3]

In the South, women's role in the production of textiles and clothing enhanced their connection to one of the few kinds of property to which they had legal claims. Wearing apparel was a very particular form of personal property: all sorts of people who could not own much of anything else in law could make credible legal claims to clothing and the materials that went into making clothes. Those claims were important because cloth and clothing still had significant value in the early nineteenth century, even though mass production was fast eroding what had once represented a major source of wealth only a generation earlier. Clothing served as currency in a world where other mediums of exchange were hard to come by. Used clothes circulated not only in urban pawnshops but also in provincial markets and local neighborhoods.[4] Trade in new textiles and clothes also flourished. Fabric, buttons, ribbons, and other sewing notions formed the bulk of many stores' business, even in remote areas. Those same stores also served as clearinghouses for the goods that women spun, wove, and sewed.[5]

This essay explores free women's legal claims to cloth and clothing in Virginia, North Carolina, and South Carolina. Such claims have gone largely unnoticed because both contemporaries and later historians have traced economic development and legal change through the property that men owned—that is, land, slaves, and other forms of capital. The available sources bear the imprint of those presumptions, which pushed women's economic activity so far to the margins that it often went unrecorded. No one made an effort to keep track but the women themselves, very few of whom bothered to keep written accounts, making it difficult for historians to reconstruct their endeavors. The evidence, however, suggests that women regularly traded in

textiles and that they did so with the expectation that what passed through their hands was theirs to control. Those transactions lay in a murky area of property law, one in which published legal principles did not address ownership of such property and control was established in spaces between written law and social practice. Practice established women's connections to textiles; those connections legitimized women's control over such items during their lifetimes; and customary control created patterns that fit around the existing principles in law, although not directly recognized as legal ownership.

That situation suggests that the historiography has placed too much emphasis on legal principles, abstracted from context, in characterizing free women's legal status in the slave South. Even recent scholarship that has focused on the gendered dynamics of power, with a particular emphasis on women, has affirmed problematic assumptions long present in the literature. Central to them is a literal reading of a particularly restrictive version of coverture associated with Sir William Blackstone's *Commentaries on the Laws of England*. Working with this model, southern historians have assumed that free women surrendered their entire legal persona, not just particular legal rights, to their husbands on marriage. They became dependents without the ability to act for themselves in law, a situation that all but prohibited independent economic activity and circumscribed their social and political influence. The dependence of free women, in turn, established their husbands' and fathers' independence, which became the reason for extending full civil and political rights to all white men. This gendered construction of power, which emphasized men's need for civil and political rights to protect their interests and their dependents, lies at the heart of much of the recent scholarship.[6] As I have argued in *The People and Their Peace*, this historiographical emphasis on rights in determining women's legal standing is problematic because rights were not the only means of access or influence in the legal system as it operated in the early nineteenth century. Free women's work in textile production underscores that point by bringing into focus the complicated legal dynamics that allowed women to control property as if they owned it outright. In the early nineteenth century, prohibitions on women's property ownership existed alongside established legal practices that allowed married women and dependent daughters to control and trade property, particularly textiles, which lay within their economic purview. In an economic context where cloth and clothing had become important commodities, those legal claims allowed women to operate on their own within a key segment of the economy. Most free women were legally dependent.

But dependence did not always take the forms—in law or practice—that the historiography now suggests.[7]

The market value of women's textile production was easy to miss in the early nineteenth century and is even easier to overlook now. Textile production blended in with women's unpaid domestic work so well that it can be virtually impossible to distinguish between the two. Although women kept track of their accounts, they did not always do so systematically or in writing. Nor did they see the necessity of distinguishing between paid and unpaid labor, as later historians would have liked. A cursory reading of Anna Kagey Wayland's diary, for example, yields the impression of a particularly industrious Virginia farmwife in the 1850s. Only if the reader carefully tracks the names does it become clear that much of Wayland's sewing was done for men outside the household, presumably for pay. In Wayland's mind, however, such labor constituted such a normal part of her regular work routine that it was unremarkable.[8]

Deeply rooted cultural conventions that characterized women's labor differently than men's labor further obscured the importance of this kind of work. In the early nineteenth century, the rhetoric of male independence associated women with a domestic realm characterized by altruistic sentiment. Later, the ideology of separate spheres further distanced women from productive labor and commercial exchange. Both cultural constructs marginalized women's labor and attributed its value to the male household head.[9] Those conceptions colored all the sources from the period. The census, for example, notoriously underreported women's labor. Much of their work in the textile industry has disappeared from view because census takers did not usually categorize women who worked from their homes as being engaged in trades or businesses. Women are equally difficult to trace in other kinds of sources that provide evidence of business activity.[10]

Trade in textiles, however, constituted a significant segment of the economy. The records of southern stores indicate that fabric and other notions for clothing comprised the bulk of most families' expenditures at their local stores. Local stores also bought what women produced: skeins of spun wool, cotton, and flax; yards of woven cloth, blankets, and carpets; and shirts, breeches, and other items that women sewed. In addition, merchants facilitated women's trade with other customers. Doing so benefited merchants because so much of their trade was in textiles. Merchants could sell fabric to customers without the skill or inclination to make it into clothing if they could set those customers up with good seamstresses. Merchants also con-

tracted directly with seamstresses for sewing and millinery work requested by their customers. Others served as economic intermediaries, transferring store credit from clients to the women who did work for them.[11]

The bulk of women's trade in textiles, however, does not appear in store accounts. The evidence hides in plain sight, turning up in a wide array of sources, although often in unexpected contexts, such as local court records. Women appeared in court when they sewed for the wrong people, as did Elizabeth Smith, a white woman from Granville County, North Carolina, who was charged with illegal trading with slaves in 1808: she made overalls and other items of clothing for an enslaved man. People regularly stole clothing, skeins of spun thread, and cloth because they were so easily traded. Thread was more desirable than clothing or even cloth because it was not as easily identified. Clothing, by contrast, could be traced back to the owners. In one 1817 theft case, Susannah Allen, a skilled needlewoman in Granville County, was called in to see if she could identify the provenance of the stolen shawl in question by its decorative trim.[12] Not all transactions in textiles and clothing, however, were illicit. Bills and payments to women crop up in individual business papers. Two Virginia seamstresses, Mrs. Forester and Polly Gilham, presented bills directly to their clients, who saved the documents with their other papers. Forester presented hers in 1839 to Caroline Cocke, who also seems to have been married. Gilham requested payment in 1791. Evidence of Cettie Agee's work comes only through the hand of her client, Mary Brown, who noted sometime between 1855 and 1885 that she paid Agee the equivalent of $2.50 for a dress.[13] Women also referred to paid work in textiles and clothing in their diaries and personal correspondence, although they did not always indicate when they were producing for the market.[14]

Southern women began producing textiles and clothing for the market in the colonial period, just as women in the northern colonies did. Although working at home and within the scope of their traditional duties, these women were feeding the needs of the developing mass market for ready-made clothes. By the nineteenth century, the industry had developed in ways that opened up more opportunities for women. Textile production was segmented and consolidated even as it was being mechanized. Women supplied the market, spinning and weaving for manufacturers and middlemen who bought up goods, although it was more likely that they spun than wove, because looms were large, expensive, and required skill to operate. As cloth became more plentiful and affordable in the nineteenth century, de-

mand increased. So did demand for the skills necessary to turn cloth into clothes. Clothing production had always been characterized by a hierarchy of talent, skill, and experience. At the top of the pecking order were skilled dressmakers and tailors who could fashion a pattern to fit a client and cut fabric into the necessary pieces. Less skilled artisans then sewed the pieces together. By the early nineteenth century, that work was increasingly done by women, not men, as historian Marla R. Miller has shown. The seamstress could be either someone from the household whose labor was uncompensated or someone who was hired to do the work. Seamstresses also started taking over other work that used to be done by men in the tailoring trade, including the production of men's garments that were easy to cut out and fit. Those currents ultimately coalesced into the labor patterns of the ready-to-wear market, with women sewing together precut pieces into finished garments.[15]

The Cooley women covered the entire range of production possibilities in textiles and clothing, and their patterns of work represent what other women did as well.[16] The base of the Cooley women's operations was a flock of sheep. After they cleaned the raw wool in the late spring, they took it to a mill to have it carded. Although other women continued to card their own wool, those who produced larger quantities seem to have used carding machines, which were available at many local mills.[17] The Cooley women then spun the wool as well as cotton and flax, although they did not produce cotton and flax themselves. When other women spun, they usually did so for trade, not their own use, because so few had access to looms or the skills to use them. Evidence suggests that women spun in an informal piecework system, acquiring machine-carded rolls of wool or cotton from local merchants or other suppliers, spinning it, and then trading it for other goods. Although the Cooleys wove some of what they spun, they also traded spun thread with neighbors or at the local store. The Cooleys then wove a variety of different kinds of fabric, including blankets and coverlets. Although they took orders for specific items, they sold most of what they produced to local stores at intervals during the year when they needed goods and when prices were high for their manufactures.[18]

The Cooley women also developed a tailoring business. When Elizabeth started writing her diary as a teenager, she, Amanda, and Julia Ann had begun to sew for neighbors. They started by sewing together precut pieces and making up simple garments, such as men's shirts, vests, and pants, which were easy to cut and fit. Their entry into this kind of work paralleled similar

developments in the Northeast, where women began taking over the production of men's basic clothing in the early nineteenth century. In less remote areas, these items would have been available in the 1840s as ready-to-wear, sewn by seamstresses who did piecework in the northeastern cities. In the rural South, it was easier and cheaper to purchase items directly from local seamstresses. The Cooley women then started taking orders for men's coats, although they did so reluctantly when they first started in the early 1840s. Coats required skill to cut and fit properly. Mistakes resulted in the destruction of expensive fabric, unflattering garments, and angry customers unwilling to pay. After a few brief forays into this area, they received instruction on patternmaking and fitting from an itinerant male tailor who seemed inexplicably unconcerned about the competition his advice was creating. Thereafter, the Cooleys regularly took orders for coats, doing a particularly brisk business right before militia musters, when men wanted to look smart in properly cut and decorated attire. Although most of their work was in men's clothing, the Cooleys also quilted and occasionally sewed dresses for local women. In general, though, women tended to sew their own dresses, to collaborate with friends, or to have them done by skilled dressmakers who specialized in that aspect of the trade.[19]

What was women's legal relationship to such property? That question has no clear answers. A well-developed body of scholarship explores women's ownership of some forms of property, primarily land but also other forms of capital and slaves.[20] This focus in part reflects long-standing historiographical assumptions that emphasize forms of property that were central to a developing commercial economy. Other kinds of property—such as clothing, livestock, tools, and furniture—have received much less attention. But the existing historiography is also a function of the sources, which remain largely silent about women's claims to these other forms of property. For this question, historians usually refer to Blackstone's *Commentaries*, which became one of the most influential legal texts in the new republic. His conception of coverture—that "husband and wife are one person in law"—theoretically eliminates the possibility of married women's property ownership of any kind. He then elaborated on the implications: husbands retained a lifetime interest in real estate that wives brought into the marriage; they could claim their wives' choses in action—a legal term used to describe instruments of promise and exchange, such as contracts and debt—if they reduced that property to their possession during their lifetimes; and they acquired legal ownership of wives' other personal property. The one exception was par-

aphernalia, which referred to personal apparel and ornaments. Although husbands legally owned those items during the marriage, wives could will them to whomever they wished, implying a certain kind of control over them that even marriage could not erase.[21]

Blackstone's rendering of women's property rights, however, did not describe existing legal principles in America, particularly in the first few decades following the revolution. To be sure, Blackstone's vision acquired considerable purchase among legal professionals in the early republic. Treatise writers, including St. George Tucker, Tapping Reeve, James Wilson, and James Kent, adopted Blackstone's view of domestic relations. Those principles eventually made their way into statute and case law as well. Yet as historian Holly Brewer argues, Blackstone's *Commentaries* did not provide an accurate historical depiction of common law practice at the time, even though his work was based on existing common law principles. His was an approach that produced innovation under the guise of tradition. According to Brewer, that was particularly true in the area of domestic relations, where Blackstone selected principles that, while related, did not constitute a coherent statement about the status of wives. He then fashioned those disparate elements into a new synthesis that described wives' legal status. The results narrowed the legal possibilities for wives as well as for other domestic dependents. But that outcome owed as much to Blackstone's synthesis as to the existing common law principles on which he drew.[22] Blackstone's synthesis has had a powerful effect on the historiography because it became the primary target of the women's movement. As Mary Ritter Beard has argued, nineteenth-century activists focused on these restrictions to accentuate the extent of women's inequality. While politically astute, the historiographical effect was to flatten the complexities of women's legal status at the time. Unpacking that complicated historical and historiographical situation makes sense of historians' findings that married women in the southern colonies engaged in a much wider range of legal activities than is indicated by Blackstone's rendering of common law. Recent work in legal history indicates that those practices continued well into the nineteenth century in the sense that married women engaged in more numerous and varied legal options than Blackstone's *Commentaries* permits.[23]

Manuals published for justices of the peace in Virginia, North Carolina, and South Carolina also suggest that it took several decades for Blackstone's influence to reach the lower levels of the legal system. Justices served at the first level of the legal system, where they screened the evidence and ei-

ther resolved the matter or sent the case up through the legal system. Cases involving cloth and clothing would have been resolved in this arena—although the trade in such items was significant in the aggregate, the value of each item or transaction was small. In the colonial period, justices relied on versions of English manuals, usually Richard Burn's *Justice of the Peace* or Michael Dalton's *The Country Justice*. In the first few decades following the revolution, legal writers and reformers issued a series of new manuals in an effort to bring legal practices in line with their states' laws. The extent of actual updating in the sections on wives' legal status, however, varied widely. Many of the new manuals simply duplicated Burn, with a few additions.[24] This situation also speaks to the state of existing state law on matters relating to wives' legal status: there was little need to update in this area because there were so few statutes that conflicted with the principles laid out in existing justices' manuals.

The manuals also reflected the state of existing legal culture, which tolerated a good deal of ambiguity and inconsistency. They do not approach the comprehensiveness of Blackstone, let alone modern expectations for guides of this kind, because that was never the intent. The sections on wives mix general principles with complicated descriptions of specific cases in a haphazard list that follows no logical progression. The reader is left to figure out the point of the cases, not all of which were obvious or easily transferable to other situations. The general statements are clear but not comprehensive. Readers would find an overabundance of specifics in some areas, such as a husband's responsibility for debts incurred for his wife's maintenance. They would find absolutely nothing about other issues. The effect of those omissions was compounded by the lack of general statements that would have provided some logical framework through which to organize the particulars. Yet the structure of these manuals is as revealing as it is frustrating. They took the form that they did because they were never meant to provide a definitive statement on married women's legal status.[25]

Additions to the manuals in the postrevolutionary decades usually appeared in the area of property and elaborate restrictions on married women's ownership. François Xavier Martin, a French expatriate who relocated to North Carolina, produced one of the most comprehensive of the postrevolutionary guides. His synthetic style is evident in his first statement, which focused on wives' relationship to property and provided the overarching framework for the entire section: "A feme covert, being under her husband's power, is disabled from making any bargain or contract, without

his consent, privity, allowance, or confirmation; she can neither sue nor be sued without her husband." Specifics then followed from that general statement. Among them was a prohibition against wives' leaving wills without their husbands' permission, a restriction that also implied wives' inability to own property.[26] John Faucheraud Grimké based his South Carolina guide, published in 1788 and updated in 1796, on Burn's *Justice of the Peace*. But he added the same prohibition on wives' wills, citing a 1732 South Carolina statute. He also included entries on wives' renunciation of dower rights and inheritance, both of which were crucial in the sale of lands, and a statement about the property rights of wives who were sole traders. But he issued a substantially shortened 1810 revision that omitted all of those additions.[27]

Not until the second decade of the nineteenth century did justices' manuals begin adopting Blackstone's vision of married women's property. Even then, what is most striking about these guides is their inconsistency on the issue. William Waller Hening's 1819 update to his Virginia guide was one of the few to incorporate direct quotes from Blackstone on wives' relationship to real and personal property. The third edition, published in 1820, kept those changes. Such prohibitions did not appear in North Carolina until Benjamin Swaim's 1839 guide. South Carolina's 1848 guide did not contain any information at all about women's property.[28] While the move toward restrictions on women's property is clear, the larger pattern consists of wide variations and unevenness in coverage across guides, even among those for the same state. It is uncertain, moreover, whether and at what pace new guides supplanted the old ones. Many justices may well have continued to use worn editions of Burn or Dalton instead of acquiring updated versions issued by legal reformers in their states—if they used the guides at all.

Justices' manuals were simultaneously clear and vague about women's legal control of property. Nothing in the manuals would suggest that wives could legally own property of any kind either before the revolution or in the decades immediately following. The prerevolutionary guides imply that wives could not. The postrevolutionary guides affirm those presumptions while elaborating on the restrictions with ever greater clarity over time. But those restrictions, particularly in the first decades following the revolution, do not constitute a uniform statement on the legal handling of wives' property rights, particularly their rights to less valuable forms of personal property. Actually, the guides hedged, keeping restrictions on women's property ownership but allowing their legal control over property in some situations. Martin's guide, for example, banned wives from trading or contracting

without their husbands' consent. But he did not disallow such activities altogether. Both Martin and Grimké proscribed the writing of wills but allowed it with the husband's permission, suggesting that married women could have property that was considered theirs in some sense. Most guides from this period also affirmed that husbands were responsible for their wives' purchase of items necessary for their maintenance, a principle that suggested that wives purchased such items on their own. Perhaps most revealing is a supplemental note, attached to a sample indictment for robbery in Grimké's guide, that explains that the form must indicate that the goods belonged to the husband, "for a wife can have no property." Why would that point require explanation unless some people thought it was possible for women to "have" property, even if they could not own it legally in the same way as their husbands?[29]

This indeterminate postrevolutionary framework reflected and shaped legal practice in the early nineteenth century. Property law was the most elaborated and professionalized of all areas of law in the new republic. Lawyers and courts followed the principles laid out in case law, statutes, and treatises when it came to property law. Property law also structured basic economic transactions in daily life. Merchants followed its rules to buy goods and collect on accounts. Farmers followed its rules to sell and purchase land. Ordinary people followed its rules whenever they went to the store. Given this context, in which the written rules of law had become ingrained in daily life, the postrevolutionary justices' manuals are particularly telling about the operation of law.[30] The manuals acknowledged a situation that both prohibited wives' property ownership and allowed openings for them to control certain items. The guides also created legal spaces for those patterns to continue, even after their writers adopted more restrictive notions of married women's legal claims to property.

Those patterns were particularly pronounced in the area of textiles and clothing because women had responsibility for that area of production. Many household economies in the early nineteenth-century South operated according to the gender dynamics described by Laurel Thatcher Ulrich in *A Midwife's Tale*. Southern families separated women's economic responsibilities from those of men, just as families did in New England. Women kept track of production and expenditures in their area of interest, which included the preparation of food and clothes for the household. They regularly extended production in those areas so that they could trade the surplus for items that they needed or wanted but could not produce themselves. They

sold fresh produce, butter, eggs, and chickens. But textiles formed a more significant part of women's trade because such work was so accessible to so many. Most women could spin or sew even if they did not have the resources to keep a kitchen garden, milk cows, or a flock of chickens.[31]

This context, in which it was assumed that women took responsibility for textile production, explains merchants' trading practices with women. Store records indicate that women regularly purchased cloth, trimmings, and other items necessary for the production of clothing. They went to stores, as the Cooley women did, to sort through the merchandise and make their selections. They also made special orders to acquire specific kinds and colors of cloth and trimmings.[32]

The dynamic is particularly clear in women's correspondence from the early nineteenth century. Their letters are filled with accounts of hunting for just the right kind of fabric or trimming. Sometimes husbands, fathers, and other male relatives appear as collaborators in the search. Men routinely shopped for their female relatives when they went on trips to large cities. They arrived armed with detailed lists; they made the rounds of the stores; they obtained samples and fashioned lengthy descriptions of the desired items and their prices; and then they sent all this information back home and awaited further instruction before making purchases. But men rarely figure into discussions about such purchases unless they were filling orders in this way. As women described it, they purchased goods without expecting or encountering questions about whether or not they could do so. "The three days in Paris," wrote North Carolinian Louisa Collins, "is not to be mentioned in the same breath with the three days we spent in Baltimore." What made it so memorable was that she and her female companions were continually shopping. She describes the final day as "a scene for Hogarth," with "all the milliners' girls & shoemakers' boys waiting . . . with their bills, not a thing packed up." Such descriptions might be attributed to wealth were they not so widespread. To be sure, the quality, quantity, frequency, and location of women's purchases depended on their economic status. Most women could not afford Collins's shopping spree. But wealth alone did not determine women's attitudes and practices. The Cooley women routinely went to town "a trading" and bought what they wanted.[33]

Women took this attitude because many of them also paid their own clothing bills and indeed their own household bills. To be sure, husbands and fathers settled clothing accounts in some households. When creditors demanded payment on accounts, they followed legal principles that held all

husbands and fathers responsible for their wives' and daughters' debts. In practice, however, women took responsibility for what they produced and for purchases related to their sphere of interests within the household economy. The Cooley women's diary entries, for example, clearly connect their purchases with the sale of goods that they produced. In July 1846, Amanda wrote, "We all went to Hillsville a trading." But, she concluded, "we could not sell our cloth and did not get many things." A trip later that month ended quite differently because the Cooleys obtained good prices for their wool and linen cloth. On that trip, Amanda bought a bonnet, a bolt of cloth, and a few other things. Amanda's and Elizabeth's diaries make it clear that the Cooley women kept what they made and spent the proceeds on items within their sphere of economic activity: materials for clothing, staples for food production, decorations for the house, and kitchen utensils. Seeing to those aspects of life was their responsibility, and they took it quite seriously.[34]

Merchants responded in kind, dealing with some women as independent traders when it came to those items within their economic purview. The records of those who kept running tallies of daily transactions show that women regularly came in to make purchases, which they immediately paid for rather than charging them to a credit account. Some merchants recorded women's purchases under the accounts of their husbands and fathers but still connected the sales to the women themselves. This form of accounting blended legal principles that assigned property to the male household head with legal practices in which women took actual responsibility for particular purchases. Some merchants simply kept credit accounts in married women's names. These practices, to a certain extent, depended on a context in which local stores drew on personal knowledge of their customers to conduct business. In such a milieu, the ability of married women to transact business with their husbands' permission took on particular meanings. Relationships were so well established that local merchants would know the women with whom they could conduct business and in what manner.[35]

But more than just local knowledge mattered when it came to women's purchases in clothing. Merchants in larger towns and cities sold directly to women whom they did not know, particularly when buying cloth and other textiles. Such transactions generally required immediate payment because neither the women nor their husbands had credit with these merchants. In the early nineteenth century, merchants extended credit based on their knowledge of the customer. A stranger could not walk into a store and receive credit without references of some kind. Even so, merchants still took a

chance selling directly to women. How did they know that married women, even if they had cash in hand, had permission to purchase anything? Moreover, an intermediate method of payment between cash at the time of purchase and a credit account existed and could run for years without ever being settled. That form is evident in Collins's Baltimore shopping excursion, in which she and her friends purchased all manner of items with the store owners' knowledge that the women were from out of town and the expectation that they would pay before they left. To translate the situation into more familiar terms, the difference was akin to that between a charge card (which requires complete payment at defined, periodic intervals) and a credit card (which requires partial payments on a running debt that could continue indefinitely). Merchants regularly sold in this way to women. When they did, they were betting that the women who appeared in their store would pay in full when they received the bill. The pattern suggests that merchants sold textiles to women because it was presumed that they had discretion over such purchases. A woman's presence in the store served as evidence that she had the authority to make such purchases. Discussion about whether such purchases should be made—to the extent such matters were discussed at all—took place within families.[36]

Women's claims to such property were legally recognized only to the extent that they existed as established social practices. No one questioned women's ability to control and trade their property. But they did not own that property legally. The contradiction inherent in that situation became strikingly clear at the death of the husband or wife, when legal control gave way to the legal principles of ownership. When Elizabeth's and Amanda's father, Benjamin Cooley, died in 1847, the inventory of his property included all the materials and tools—twenty-eight head of sheep, spinning wheels, and looms—that his wife and daughters used in their trade as well as all the household items that they had purchased. This legal document represented the property that the women had controlled as Benjamin's, even though he never would have asserted such claims in his lifetime. The clients of his wife and daughters had always conducted business directly with them. The Cooley women took orders and received payment, which they kept as their own. After Benjamin Cooley's death and the legal formalities that came with it, the women continued to use the property as they always had. That was, in part, because Benjamin Cooley recognized his wife and daughters' claims on the property in his will. His wife, Jane, acquired control of his real and personal property until her death. All his daughters received property

worth $250 at the time of their marriages—presumably what they would need to set up their own households. His son, James, had to live at home with his mother and unmarried sisters, waiting until he assumed ownership of the farm. Benjamin distributed the rest of "his" personal property evenly among his children after the death of his wife, enabling the women to claim the tools that they had used and the household goods that their labor had helped purchase.[37]

The inventory also erased the complicated relationships of the Cooley women to that property. Jane Cooley oversaw the textile business. She taught her daughters and the hired help how to do the work. The tools and materials that they used were hers in the sense that others connected them to her. But Jane Cooley's business had the collective purpose of fulfilling her economic responsibilities within the household and supporting her and her daughters' needs and desires. Elizabeth's and Amanda's language is interesting in this regard. Both attribute the items they produced to the person who did the most work on the finished item. Cloth that their mother wove was "hers." The language, however, recognized skill and labor rather than ownership. All of the women participated in preparing the materials necessary to weave cloth, and they split the proceeds, although Jane Cooley clearly kept what was necessary to maintain her household expenses. Even so, all the Cooley daughters made purchases of their own with resources from their collective enterprise. More to the point, Jane Cooley maintained the important relationships in her life through her property. The social importance of property was particularly evident when her son, James, married soon after Benjamin Cooley's death. James's marriage provoked a crisis for Amanda, who feared that it would marginalize her mother and her younger sister, Julia Ann. While Amanda fretted, her mother promptly incorporated James's seventeen-year-old bride into the textile business, thereby adding another pair of needed hands, establishing the young wife's relationship to the other women in her new family, and solidifying Jane's position within the household. In that sense, Jane Cooley's cloth had value well beyond what it fetched at the store.[38]

* * *

Free women had few economic options in the early nineteenth-century South. The lives of Elizabeth and Amanda Cooley provide particularly dramatic illustrations of this situation. Both women dreamed of more in life and wrote about those dreams extensively in their diaries. They wanted to

do meaningful labor, to have more resources of their own, to live on their own terms, to see the world beyond their remote corner of southwestern Virginia, and to be less dependent on their parents. Contemplation of those plans, however, usually ended in despair, because these women had so few alternatives. Neither textile production nor teaching—which all the Cooley daughters also did—sufficed. That left only one option: both Amanda and Elizabeth realized that they would need to marry to leave their parents' household. At age twenty-one, Elizabeth married a man who shared her ambitions but lacked the resources necessary for independence in Virginia. So they left for Texas immediately after their wedding, full of hope for a better life. Elizabeth never reached that destination. The Mexican-American War forced the couple to detour to Missouri, where they lived with relatives. Elizabeth died of typhoid fever there in 1848, just two years after she left home. Prior to Elizabeth's death, Amanda tried to be happy for her sister, knowing how excited Elizabeth was about leaving to fulfill her life's dreams, but she could not reconcile herself to her sister's absence. Amanda continued to work with her mother and began teaching school more regularly. But school terms were only a few weeks long, and the work did not pay enough to make her independent. She boarded with local families, often under difficult conditions. Between terms, she returned home, a situation that grew unbearable for her after James married. She wrote regularly about the possibility of marriage but could not find a man to whom she was willing to commit. Then, in 1854, at the age of thirty, she finally married. Her last diary entries were happy, full of plans for a future that would be her own. Like Elizabeth, however, she never reached her destination, dying of tuberculosis just three weeks after her wedding. Julia Ann wrote the final entry in her sister's diary: "The writer of this journal is now no more. . . . She died in full hope of inheriting a crown of Glory. God grant her hopes may be realized and I believe they will."[39]

Both textiles and property law framed Elizabeth's and Amanda's lives. The two women sought possibilities that were beyond their grasp. What makes their stories so poignant is that they never realized those dreams. What makes their lives revealing is what they had but did not appreciate: the Cooley women were not dependent in the way that southern historiography suggests that the wives and daughters of free white men were. They produced for the market, kept the proceeds, and took care of their own economic responsibilities. Although existing legal principles made it clear that married women could not legally own property, those prohibitions did not

keep married women from trading in property that they produced and making decisions about the disposition of the proceeds. Such practices did not represent exceptions to the law. They existed as an application of existing legal principles in a particular context that joined market forces to expectations about women's roles. Textiles and clothing were marketable commodities *and* items for which women took economic responsibility as part of their household production. In this context, women maintained legal control over the items they traded even though they lacked property rights of their own. Free women occupied a legal status in which control of property could exist in the absence of property rights and in which they could act as legal agents in certain circumstances. That situation suggests how little we still know about southern law and the lives of southern people—and how much we can discover when we explore what the law both did and did not do.

NOTES

1. Elizabeth Ann Cooley McClure Diary, Amanda Jane Cooley Roberts Diary, Virginia Historical Society (VHS), Richmond.

2. McClure Diary; Roberts Diary.

3. For discussions of these changes and their implications for women's labor in the Northeast and England, see Christopher Clark, *The Roots of Rural Capitalism: Western Massachusetts, 1780–1860* (Ithaca: Cornell University Press, 1990); Thomas Dublin, *Women at Work: The Transformation of Work and Community in Lowell, Massachusetts, 1826–1860* (New York: Columbia University Press, 1979); Beverly Lemire, *Dress, Culture, and Commerce: The English Clothing Trade before the Factory, 1660–1800* (London: Macmillan, 1997); Marla R. Miller, *The Needle's Eye: Women and Work in the Age of Revolution* (Amherst: University of Massachusetts Press, 2006). Laurel Thatcher Ulrich has explored various elements of this transition, including the ideology that obscured it, in her scholarship. See, e.g., *Good Wives: Image and Reality in the Lives of Women in Northern New England, 1650–1750* (New York: Knopf, 1982); *A Midwife's Tale: The Life of Martha Ballard, Based on Her Diary, 1785–1812* (New York: Knopf, 1980); *The Age of Homespun: Objects and Stories in the Creation of an American Myth* (New York: Knopf, 2001).

4. Wendy Woloson, "In Hock: Pawning in Early America," *Journal of the Early Republic* 27, no. 1 (2007): 35–81; Melanie Tebbutt, *Making Ends Meet: Pawnbroking and Working-Class Credit* (New York: St. Martin's for Leicester University Press, 1983).

5. Merchant account books from this period show the pervasiveness of fabric and other items necessary for the production of clothing in customers' credit accounts. See Thomas C. Scott, Records, 1817–1823, Accession 27933, Samuel Henry, Account Book, 1818–1819, Accession 4198, Easley, Holt, and Company (Halifax County, Va.), Records, 1817–1857, Accession 27608, Green and Coleman Account Book, 1827–1864 (bulk 1827–1829), Accession 43842, John Chappell and Co. (Halifax County, Va.), Records, 1805–1817, Accession 41731, Campbell, Wilson, and Co. Journals, 1833–1848, Accessions 364, 365, Booker Family, Records, 1795–1833, Accessions 25114a–c, g, J. and A. Miller

(Winchester, Va.), Daybook, 1824–1835, Accession 23718d, Business Records Collection (BRC), Library of Virginia, Richmond. See also John U. Kirkland Account Books, #405, vols. 1–2, Southern Historical Collection, University of North Carolina, Chapel Hill.

6. The assumptions about women's legal status are not confined to a particular geographic area. In fact, as Beard has pointed out, they are traceable to the women's rights movement, which emphasized the acquisition of rights. See Mary Ritter Beard, *Women as Force in History: A Study of Traditions and Realities* (New York: MacMillan, 1946). Beard was critical of the historiographical implications; as she argued, they tended to erase women from history. What she did not appreciate was how appropriate that emphasis was in a context where individual rights were becoming more important within the legal system. That said, assumptions about free women's dependence have particular salience in the literature on the slave South because of long-standing presumptions regarding the region's backwardness, which extended to women's legal status. Those assumptions remained embedded within new scholarship, inspired by feminist theory, that focuses on the gendered dynamics of power in the region. It has staying power in the literature on the South, because free women's dependence has been so closely linked to the political economy of slavery. For the clearest statement of that link, see Elizabeth Fox-Genovese, *Within the Plantation Household: Women in the Old South* (Chapel Hill: University of North Carolina Press, 1988). The assumptions about free women's legal dependence now pervade the literature. I have relied on them myself. See Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction* (Urbana: University of Illinois Press, 1997). See also Peter W. Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 1995); Nancy D. Bercaw, *Gendered Freedoms: Race, Rights, and the Politics of Household in the Delta, 1861–1875* (Gainesville: University Press of Florida, 2003); Victoria Bynum, *Unruly Women: The Politics of Social and Sexual Control in the Old South* (Chapel Hill: University of North Carolina Press, 1992); Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New York: Oxford University Press, 1995); Stephanie McCurry, *Confederate Reckoning: Power and Politics in the Civil War South* (Cambridge: Harvard University Press, 2010); Hannah Rosen, *Terror in the Heart of Freedom: Citizenship, Sexual Violence, and the Meaning of Race in the Postemancipation South* (Chapel Hill: University of North Carolina Press, 2009).

7. Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

8. Journal of Anna Kagey Wayland, 1847–1865, Accession 24649b, Personal Papers Collection, Library of Virginia. Wayland lived in Shenandoah County, Virginia. The patterns resemble those described by Ulrich, *Midwife's Tale*. Historians of women's paid labor emphasize its invisibility because of its close relationship to women's other domestic responsibilities. See Jeanne Boydston, "The Woman Who Wasn't There: Women's Market Labor and the Transition to Capitalism in the United States," *Journal of the Early Republic* 16, no. 2 (1996): 183–206; Lemire, *Dress, Culture, and Commerce*; Marla R. Miller, *Needle's Eye*; Lorna Weatherill, "A Possession of One's Own: Women and Consumer Behaviour in England, 1660–1749," *Journal of British Studies* 25, no. 2 (1986): 145–48.

9. For the effects of such cultural constructions on conceptions of women's work, see Jeanne Boydston, *Home and Work: Housework, Wages, and the Ideology of Labor in the Early Republic* (New York: Oxford University Press, 1990).

10. For a fascinating discussion of women workers' place in the British census, see Edward Higgs, "Women, Occupations, and Work in the Nineteenth Century Censuses," *History Workshop Journal* 23, no. 1 (1987): 59–63.

11. Scott Records, 1:11 (Mrs. Barnes paid her account with breeches), 1:16 (Mrs. William Stringfellow paid her account with a mohair hat and a bonnet), vol. 2, April 11, 1818 (Zachariah Bradshaw brought in three and a half skeins of spun cotton), Unidentified, Daybook, 1823–1828, Accession 20608 BRC (did a lot of business in cotton yarn); Easley, Holt, and Company Records, December 1837 (Maria Owens ordered fabric for a client), box 3, January 26, 1838 (Owens ordered fabric for a different client); Campbell, Wilson, and Co. Journals, 30 (paid Ann Mansfield for making a cloak).

12. *State v. Elizabeth Smith*, 1800–1808, Criminal Actions Concerning Slaves and Free Persons of Color, Granville County, North Carolina Department of Archives and History, Raleigh. For the theft of spun thread, see *State v. Nancy Pettiford*, 1814, Criminal Action Papers, Granville County, North Carolina Department of Archives and History. For Susannah Allen, see *State v. John Thomason*, 1817, Criminal Action Papers, Granville County. See also *State v. James Campbell*, 1826, Indictments, Court of General Sessions, Kershaw District, South Carolina Division of Archives and History, Columbia.

13. Bill from Polly Gilham, Stuart Papers. For Mrs. Forester, see Caroline Matilda Lewis Cocke, Accounts, 1829–1840, VHS. For Cettie Agee, see Mary E. Brown, Account Book, 1855–1885, VHS.

14. In addition to the McClure Diary and Roberts Diary, see Wayland Journal; Susan Blanding to Elizabeth Carpenter, September 29, 1808, unmarked folder, William Blanding Papers, South Caroliniana Library, Columbia, South Carolina.

15. For the development of women's labor in the textile industry, see Marla R. Miller, *Needle's Eye*; Lemire, *Dress, Culture, and Commerce*. For the importance of women's market labor generally, see Boydston, "Woman Who Wasn't There." For women's textile production in the colonial period, see Linda L. Sturtz, *Within Her Power: Propertied Women in Colonial Virginia* (New York: Routledge, 2002), 134–38.

16. The Cooley women are both unusual and representative in their work patterns. They are unusual because of the scope of their labor, a situation that speaks to their economic isolation and their entrepreneurial spirit. Had the Cooleys lived closer to an urban market, it would have been possible to specialize in one specific aspect of the production process. Other women spun or wove or sewed less regularly for the market. Wayland, who lived in Shenandoah County, Virginia, seems to have done a similar range of tasks, from shearing sheep to sewing, particularly men's clothing (Wayland Journal).

17. The Millborough Carding Mill in Bath County, Virginia, had about 140 customers in 1847. See Jacob W. Bowman, Journal, 1847–1857, Accession 28075, BRC. Wayland, who also lived in a remote part of Virginia, had her wool carded at a mill as well (Wayland Journal, September 29, 1808).

18. As accomplished weavers, the Cooley women likely produced a wider array of goods than the notations in their journals indicate. The weaving instructions in other women's records include patterns for specific kinds of fabric, such as Washington delaine, dimity, and table linen as well as specific designs, such as the "Gentleman's Fancy," "Tennessee Flower," and "Botatorte Beauty," for decorative coverlets, curtains, tablecloths, and other such items. See, e.g., Archibald Stuart Papers, 1785–1817, Section 3, VHS.

19. The Cooley women's work in sewing and tailoring fits that described by Marla R. Miller, *Needle's Eye*, for the rural Northeast.

20. See, e.g., Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca: Cornell University Press, 1982); Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986).

21. William Blackstone, *Commentaries on the Laws of England* (1765–69; Chicago: University of Chicago Press, 1979), 1:430 (on coverture), 2:433–39 (on property), 129–39 (on dower). Historians still cite Blackstone or simply assume his principles when describing married women's relationship to property in the early nineteenth century, even though historians have been arguing that the situation—in the colonial period and the early nineteenth century—was more complicated. Joan R. Gundersen and Gwen Victor Gampel, in "Married Women's Legal Status in Eighteenth-Century New York and Virginia," *William and Mary Quarterly*, 3rd ser., 39, no. 1 (1982): 114 n. 2, point out that "scholars continue to cite Blackstone as the 'real' law and then note a few exceptions."

22. Holly Brewer, "Domestic Relations and the Law," in *Cambridge History of American Law*, ed. Christopher L. Tomlins and Michael Grossberg (New York: Cambridge University Press, 2008), 1:288–323; Beard, *Women as Force in History*. See also n. 6.

23. Brewer, "Domestic Relations and the Law"; Gundersen and Gampel, "Married Women's Legal Status"; Sturtz, *Within Her Power*; Beard, *Women as Force in History*. For the nineteenth century, see Edwards, *People and Their Peace*; Hendrik Hartog, *Man and Wife in America: A History* (Cambridge: Harvard University Press, 2000). The work on slaves and property is also particularly interesting. See Dylan Penningroth, *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* (Chapel Hill: University of North Carolina Press, 2003).

24. Most of the manuals in the subsequent notes built on Burn, with the earlier ones cleaving more closely than the later ones, although the later ones tended to add material rather than abandon the basics of Burn altogether.

25. [John Faucheraud Grimké], *The South-Carolina Justice of Peace, Containing All the Duties, Powers, and Authorities of That Office, as Regulated by the Laws Now of Force in This State, and Adapted to the Parish and County Magistrate* (Philadelphia: Aitken, 1788); [John Faucheraud Grimké], *The South-Carolina Justice of Peace, Containing All the Duties, Powers, and Authorities of That Office, as Regulated by the Laws Now of Force in this State*, 2nd ed. (Philadelphia: Aitken, 1796); John Faucheraud Grimké, *The South-Carolina Justice of Peace, Containing All the Duties, Powers, and Authorities of That Office* (New York: Swords, 1810); John Haywood, *The Duty and Office of Justices of the Peace, Sheriffs, Coroners, Constables, &c., According to the Laws of the State of North Carolina* (Raleigh, 1808); William Waller Hening, *The New Virginia Justice, Comprising the Office and Authority of a Justice of the Peace, in the Commonwealth of Virginia* (Richmond: Nicolson, 1795); François Xavier Martin, *The Office and Authority of a Justice of the Peace, and of Sheriffs, Coroners, &c: According to the Laws of the State of North-Carolina* (n.p.: Martin, 1791); François Xavier Martin, *The Office and Authority of a Justice of the Peace, and of Sheriffs, Coroners, &c.: According to the Laws of the State of North-Carolina* (n.p.: Martin and Ogden, 1804); Henry Potter, *The Office and Duty of a Justice of the Peace: A Guide to Sheriffs, Coroners, Clerks, Constables, and Other Civil Officers, According to the Laws of North Carolina* (Raleigh: Gales, 1816); Henry Potter, *The Office and Duty of a Justice of the Peace and a Guide to Sheriffs, Coroners, Clerks, Constables, and Other Civil Officers According to the Laws of North-Carolina*, 2nd ed. (Raleigh: Gales, 1828).

26. Martin, *Office and Authority* (1791), 144–45, 284, 144. The updated 1804 version did not change the sections on wives.

27. [Grimké], *South-Carolina Justice of Peace* (1788), 499–505, the prohibition on making wills is on 504; [Grimké], *South-Carolina Justice of Peace* (1796), 614–21; Grimké, *South-Carolina Justice of Peace* (1810).

28. William Waller Hening, *The New Virginia Justice, Comprising the Office and Authority of a Justice of the Peace in the Commonwealth of Virginia*, 2nd ed. (Richmond: Johnson and Warner, 1819); William Waller Hening, *The New Virginia Justice: Comprising the Office and Authority of a Justice of the Peace in the Commonwealth of Virginia*, 3rd ed. (Richmond: Cochran, 1820). In North Carolina, Swaim referenced Reeve in *The North-Carolina Justice: Containing a Summary Statement of the Statutes and Common Law of this State* (Raleigh: Gales, 1839); Benjamin Swaim, *The North Carolina Justice: Containing . . . Forms and Precedents Relating to the Office and Duty of a Justice of the Peace and Other Public Officers, According to Modern Practice*, 2nd ed. (Raleigh: Taylor, 1846). For South Carolina, see Archibald Edward Miller, *Miller's Compilation for the Use of the South-Carolina Law Officer: Rules of Court, Fee Bills, and Useful Forms, with Notes and References* (Charleston, S.C.: Miller and Browne, 1848).

29. Martin, *Office and Authority* (1791), 43–44, 284; [Grimké], *South-Carolina Justice of Peace* (1788), 499–505 (for the explanation of women's property in assault cases, see 24).

30. As I have argued in *People and Their Peace*, property law was much more professionalized, centralized, and systematized than criminal law in the early nineteenth century.

31. Ulrich, *Midwife's Tale*. For examples see n. 32.

32. See Scott Records; Henry Account Book; Easley, Holt and Company Records; Green and Coleman Account Book; John Chappell and Co. Records; Campbell, Wilson, and Co. Journals; Booker Family Records; J. and A. Miller Daybook; Kirkland Account Books.

33. Louisa Collins to Anna Mercer Harrison, December 9, 1838, Byrd Family Papers, 1791–1867, Section 6, VHS. The diaries of McClure and Roberts are punctuated with regular shopping trips. Other examples include Colville Griffith to Sally Winslow Griffith, Randolph Family Papers, 1786–1970, Section 4, VHS (he is on the hunt for hats); Thomas A. Means to Anna Maria Norwood, March 14, 1833, Norwood Family Papers, 1849–1910, Section 4, VHS (he is on the hunt for fabric); Ophelia Cary to William Cary, March 13, 1840, William Cary to Ophelia Cary, February 29, 1840, Feamster Family Papers, Library of Congress, Washington, D.C. (he is purchasing fabric and other items).

34. Roberts Diary, 60–61. Other evidence suggests that many women kept separate accounts, selling items that they produced to cover the purchases that they needed to maintain their area of economic interest. Sturtz, *Within Her Power*, 115–16, describes such a situation with Rebecca Coles, a plantation mistress in Virginia, whose accounts extended to the 1820s. Other women's accounts indicate similar patterns: see Lucy Lilly Robinson Temple, Account Books, 1837–1850, Mary E. Brown, Account Book, 1855–1885, Caroline Matilda Lewis Cocke, Accounts, 1829–1840, VHS.

35. For daily transactions where women paid at the time of purchase, see Scott Records. Most local stores' records have examples of accounts for married women. The number suggests that not all were widows. For a particularly good example of credit accounts by married women, see Kirkland Account Books. For this kind of situation in the colonial period, where merchants dealt with some women independently, see also Sturtz, *Within Her Power*, 111–40. For the importance of local knowledge in the attribution of property, see Edwards, *People and Their Peace*, 133–68.

36. Louisa Collins to Anna Mercer Harrison, December 9, 1838, Byrd Family Papers. For other examples of bills presented to married women, see Cynthia Beverley Tucker Washington Coleman, Accounts, 1858–1873, Mary Randolph Harrison, 1773–1835, Accounts, 1827, Caroline Matilda Lewis Cocke, Accounts, 1829–1840, VHS.

37. Roberts Diary, 76–176; for the will and inventory of the estate, see 177–81.

38. Ibid., 128–76.

39. Ibid., 176.

Democracy, and Lynching, in America

Christopher R. Waldrep

FOR MOST OF AMERICAN HISTORY, the Constitution has symbolized the nation's commitment to liberty and the rule of law, a fundamental pledge to make freedom a national principle. Since 1985, though, questions about whether the Constitution should be properly seen as a freedom document have gained momentum.[1] Much of this criticism cites the powerful role played by white southerners at the 1787 Constitutional Convention in Philadelphia. According to this portrait of the founding, the Three-Fifths Clause gave white southerners an unfair advantage in elections; the Fugitive Slave Clause sanctioned slavery; Article I, Section 9, protected slave imports for twenty years; the Insurrection Clause guaranteed federal help in putting down slave uprisings; and the electoral college allowed southerners to pick the president in most elections.[2] This emphasis on white southerners' success in controlling the convention that drafted the nation's organic law raises questions about white southern distinctiveness. Here the basic argument implicates the entire nation, through its organic law, in that most southern of institutions, slavery. The South, Howard Zinn wrote in 1964, "far from being utterly different, is really the *essence* of the nation."[3] Maybe he was right.

Claims of a distinctive South rested somewhat more comfortably in an older tradition that saw slavery as merely incidental rather than central to the republican ideology foundational to the American Revolution and the Constitution. In this vision, the American South stands apart from the more progressive national culture, "an abnormal growth on the national body," as Zinn put it.[4] Rather than slavery, these scholars found that the Framers' major concerns had to do with representation and sovereignty. Gordon S. Wood wrote that those who lament the Framers' failure to abolish slavery

miss the great significance of what they did accomplish—that is, "the Revolution made possible the anti-slavery and women's rights movements . . . and in fact all our current egalitarian thinking."[5] The founders, Wood wrote in 1972, were enlightened gentlemen, intellectual aristocrats who sacrificed their own class interests to encourage a democratization of politics that made it extremely unlikely that men of their character and caliber could ever again lead the nation. Part of this democratization involved legitimizing street crowds—mobs—as a way of encouraging the vulgar to take an interest in governing and politics. Wood, Pauline Maier, and John Phillip Reid all thought revolutionary mobbing important, probably because they wrote during and immediately after the 1960s, a time when protesting crowds seemed more legitimate than the formal political processes that had led to Vietnam and segregation.[6] Had they shed their presentism, these scholars could have seen more fully what Maier in fact glimpsed: localized democracy could also take the form of a lynch mob. There is, then, a hint here that mobbing, vigilantism, and lynching, by being present at creation, may not have been uniquely southern. But it was only a hint; in this school of history, white southerners stand apart from the more pacific, progressive national experience.

Neither of these two scholarly schools fully connects the dots between Americans' constitutional commitment to local democracy and racial violence. Long before 1787, white southerners had created a fundamentally lawless relationship with their slaves that had much to do with the nation's political structure but little to do with the particular articles and sections in the Constitution that directly addressed slavery. "The plantation is a little nation of its own," Frederick Douglass wrote, adding that "the laws and the institutions of the state, apparently touch it nowhere."[7] For much of his life, Douglass stalwartly defended the Constitution against its critics, disdaining those who called the document proslavery. There may be a proslavery Constitution, he wrote, "floating in the brains of Pro-Slavery Doughfaces in the North," but that was not the true Constitution, written in plain words, establishing a rule of law hostile to slavery.[8]

This essay takes Douglass's observations seriously to follow a different approach to southern distinctiveness than either side in the academic debate over the centrality of slavery at the 1787 convention. As Douglass suggested, slavery's victims experienced an institution that drew sustenance not from the Three-Fifths Clause or even very often the Fugitive Slave Clause but rather from white southerners' drive to regulate Africans and African

Americans outside the law. According to Douglass, the problem was not organic law as much as lawless violence.

In the past twenty years, just as key historians have busied themselves proving that constitutional law promoted slavery, another group of historians has worked to document the extent that racial violence outside constitutional law pervaded the late nineteenth-century American South. Unfortunately, this scholarship has been essentially ghettoized in a subfield known more for its capacity to illustrate the worst excesses of white southerners' racial violence than for its power to influence the evolving narrative of American history.[9] There may be a simple explanation for this. To show that the Constitution promoted slavery seems hugely important, a breakthrough in our understanding of national culture; to show that white southerners terrorized blacks seems too obvious, old news. This essay shows that focusing on the Constitution's slavery clauses misunderstands what nineteenth-century white southerners understood perfectly well. Not only did the American constitutional system allow local democracies in the states to tolerate and promote a separate white southern culture—one that licensed the racial violence necessary to sustain slavery—but this violence also continued after emancipation. The nation's commitment to localized democracy was the problem just as much, if not more than, the South's allegiance to slavery.

By 1787 and the writing of the Constitution, the state governments most committed to slavery had long ago put slave discipline outside their law; they wanted nothing to do with a national legal structure empowered to pry into the dark corners of the violence they tolerated against Africans and African Americans. Not only South Carolina but Virginia had also enacted colonial-era slave laws that argued for the necessity of extralegal violence against slaves. By specifically authorizing such violence, these laws placed slaves in a zone of violence outside any kind of law but certainly outside nationally enforced constitutional rights.[10] White southerners, then, had a vested interest in keeping policing local, away from national values promoting equal rights based on Enlightenment thinking.

So, here is the question: was the desire of white southerners to keep their states sovereign peculiar to their region? The question can be answered only comparatively, by contrasting southern and northern views of constitutional questions. The first blow to the argument for southern distinctiveness comes from the process of drafting the Articles of Confederation. Since southerners did not originally draft the language keeping the states' police

powers outside national jurisdiction, the Articles offer an opportunity to see what nonsoutherners thought about local policing.[11] In 1775, both Benjamin Franklin of Pennsylvania and Silas Deane of Connecticut wrote early drafts where neither man dared tread on the states' monopoly over law enforcement. "Each state would police itself," Deane wrote, while Franklin's version more broadly allowed each colony to "enjoy and retain as much as it may think fit of its own present Laws."[12]

John Dickinson of Pennsylvania and Delaware, author of the penultimate draft of the Articles of Confederation, so wanted to build a strong central government that his biographer credits him with "a strong national emphasis" and a determination to set "negative brakes" on the colonies, but he nonetheless dared not challenge the states' "internal police" powers. His original draft protected the states' police powers not once but twice. Article III reserved to the states "the sole and exclusive Regulation and Government of its internal police." Article XVIII really drove home the same point when it said that Congress "shall never . . . interfere in the internal Police of any Colony."[13] The states, then, emerged from the revolutionary era with their control over policing not only intact but virtually unchallenged. Northern states joined with southern states in this consensus, though some southern politicians proved particularly sensitive on state sovereignty issues, distrusting Dickinson's efforts.[14]

Probably nothing committed Americans to local policing more than their experience with Parliament. One reason that Congress had trouble mobilizing against the Shays rebels in 1786 was that the legislature's designers deliberately made it unlike the Parliament against which they had just rebelled. In contrast to the American Congress, Parliament made law punishing rioters like the Shaysites. Group violence pervaded eighteenth-century Europe, though perhaps most often in a form less lethal than it would take in nineteenth-century America. As described by William Blackstone, the English system encouraged local policing but kept it under centralized control in a way no antebellum American would have tolerated.[15] Historians have usually—and reasonably—described the eighteenth-century Black Acts as "draconian" for imposing the death penalty on so many minor offenses, including some fifty new crimes, mostly involving poaching.[16] However draconian they might have been, the Black Acts demonstrated once again that James Madison and the Americans came from a system where the central government exercised its police powers to assert law against riotous lawlessness. In drafting the Black Acts, Parliament used language not so different

from the Reconstruction-era Enforcement Acts Congress passed when it also intended to expand national power against customary behaviors and ancient privileges. In 1871, Congress made it a crime for "two or more persons" "to go in disguise upon the public highway" to deprive another person of his or her rights; in 1723, Parliament punished "wicked and evil disposed persons going around in disguise." It did so to protect "the persons and properties of his Majesty's subjects."[17]

Parliament could move decisively and effectively against lynchers. In 1736, when an Edinburgh mob of several thousand killed John Porteous, Parliament published a brief account of the episode that closely resembles narratives of nineteenth-century lynchings, though it happened before the term had been invented.

> Great numbers of wicked, desperate, and blood-thirsty persons of most detestable principles unlawfully assembled within the city . . . with open force and violence seized the arms of the city guard, possessed themselves of the city gates, broke open the door of the Talbooth of the said city, and laid violent hands upon captain John Porteous then a prisoner there under sentence of death, but graciously reprieved by the Queen's most excellent majesty as guardian of the realm and having in a cruel manner dragged him from the said prison, hanged him by the neck and barbarously murthered him, in manifest violation of the publick peace.[18]

Parliament held the city responsible, fining it two thousand pounds, and passed a law allowing the death penalty not only for fugitive members of the mob but for persons concealing them as well.[19] Eighteenth-century European philosophers saw this kind of policing as central to governance.[20]

Despite this consensus between North and South, historians have nonetheless emphasized sectional conflict at the Constitutional Convention, with Madison adroitly leading the southern side. According to some of the best recent scholarship on the founding, Madison "knew how to talk to northerners about slavery" and acted as a master manipulator, winning one proslavery victory after another in Philadelphia.[21] Nothing could have been further from the truth. Madison, of course, wrote extensively about his preparations for the Philadelphia convention and carefully preserved his writings. His views on majority rule reveal a man who did not trust his fellow southerners to treat those in the minority with fairness or tolerance, particularly when it came to exercising state power. But his views on this subject have been obscured by the subject of slavery.

For a variety of reasons, including his personal research into the history of earlier efforts at republicanism, Madison's evolving ideas about a new constitution jelled into a vision that menaced slavery. Madison owned slaves and had no expectation that they would or could be immediately set free; like other slave owners, he sometimes disciplined recalcitrant slaves, but there is scant evidence that he devoted the bulk of his intellectual energy to managing slaves. He attended the College of New Jersey (now Princeton University), where he studied so hard that he experimented with reducing his hours of sleep to fewer than five in twenty-four. Nor did he enter into the details of plantation management when he returned home from college. He wrote that on returning to Virginia, he passed his time in sickness "but without neglecting a course of reading." He happily commenced his political career at age twenty-five by joining the convention that wrote the original Virginia Constitution.[22] His correspondence reveals his involvement in slavery when he promised to help neighbors to catch their runaway slaves and worked to retain the value of his slave in Pennsylvania after that state passed a gradual emancipation law. Such references to the ordinary business of slavery are, however, few and far between in his papers.[23]

Madison's political experiences shaped his thinking. His time in Congress (1780–83) and in the Virginia legislature (1776–79; 1784–86) taught him that the states governed themselves poorly, with legislators catering to and fearing their constituents' emotions, prejudices, and avarice. Most of Madison's fellow legislators had a faith in the inherent goodness of humankind that legitimized the will of the majority. That was the central tenet in their governing paradigm, and it was to this viewpoint that Madison increasingly brought his objections. On August 12, 1786, he wrote disgustedly to Jefferson about the "general rage for paper money," a "folly" promoted first by Pennsylvania and North Carolina.[24] Virginia's legislature frustrated Madison as well when it made tobacco legal tender for taxes and failed to reform the commonwealth's administration of justice.[25] These failings flowed from the unhelpful influence ordinary voters exerted over the legislature; the vulgar had an appetite for cheap money and hanging horse thieves, cravings their representatives dared not deny. Madison's struggle with Virginia's criminal justice system particularly informed his thinking and contributed to his growing distaste for majority rule in the states. On this point, he came closest to directly confronting mob rule; it is clear that majorities of white Virginians expected law to do the work sometimes performed by mobs and to do so in a rough-and-ready fashion.[26] Elected to Virginia's House of Delegates in 1784,

Madison became chair of the Committee for Courts of Justice, where he proposed a series of 118 bills that would have devised a legal structure built on a network of circuit courts modeled on Great Britain's system.[27] In this effort, Madison continued Jefferson's work; Jefferson had written a nearly identical set of bills in 1776 but failed to get them passed. When the legislative session ended on January 21, 1786, Madison, like Jefferson, had fallen short. In writing that he pushed his bills "slowly but successfully" against a silent but nonetheless determined opposition, Madison revealed his long commitment to the frustrating and tedious effort he had waged against backward and hidebound local elites entrenched in their courthouses. His bill rewriting crimes and punishments sparked the sternest opposition. He said, "Here the adversaries of the code exerted their whole force." In the end, not just that bill but all the bills Madison had introduced to rewrite Virginia's system were either postponed or suspended.[28] In the next session, Madison devised a plan for district courts that he hoped would speed up criminal proceedings, and when this plan failed by a single vote, he fumed that the "necessary Reform" would not soon get another chance at passage. In this he was correct. He partly blamed this failure on the public's eagerness to hang horse thieves—he had proposed lessening the penalties in hopes of more easily winning convictions.[29]

Madison's inability to reform Virginia's court system hardened his doubts about his fellow southerners' confidence in majority democracy at the local level. "The interest of the majority," he insisted in October, is not "the political standard of right and wrong." He would later write that a majority of citizens was not the same as a majority of people and that majorities of citizens could tyrannize a minority, a problem illustrated "by the case of Black slaves in modern times."[30] Nothing in his thinking, as he related it privately to Jefferson, suggests that Madison saw the convention as principally a place to protect slavery. Instead, he planned an attack on the state sovereignty that he knew protected slavery. He believed national majorities could better arrive at true foundational principles—enlightened ideas about government—than could temporary, local majorities.[31]

Shays's Rebellion in 1786 only confirmed Madison's growing distrust of popular state sovereignty.[32] The Federalists made the Shaysites the archetype of anarchy, a menace to order that justified increasing Congress's powers.[33] Yet not all delegates saw Shays's Rebellion in so negative a light. Even white southerners committed to a stronger national union, most notably South Carolina's Charles Pinckney, warned against federal intervention in

such a local matter. Here was another opportunity for Madison to prove his southern bona fides, and had he been fully dedicated to preserving slavery from northern interference, he surely would have joined Pinckney. To Madison, though, the rebellion confirmed his doubts about the wisdom of trusting the states to control crime.[34] Madison could scarcely hope to centralize policing in the hands of Congress as Parliament had, but by implicating the national government in local policing, his plan to give Congress a veto over state laws would have taken at least a step or two toward the English model.

At the 1787 Constitutional Convention, the issue of the states' powers to police crime or to allow their citizens to police crime outside formal law lurked in the background, where it has been almost entirely overlooked by historians. No one can ignore Madison's zeal to curtail state power, which he had come to see as unreliable, feckless, vulnerable to popular passions ignited by demagogues, and not fully dedicated to the rule of law. The states tended to value politics over continuity in law. He wanted stability and thought he could achieve it by establishing a Congress with considerable power. To Madison, the real problem in the 1780s was the states, and he wondered whether "republican liberty could long exist under the abuses of it practiced in <some of> the States."[35] He warned against "the inconveniences of democracy." All civilized societies, he observed, were divided by faction; the danger came when a faction became a majority and then could oppress a minority. He noted, "We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man."[36]

The Virginians, led by Madison, wanted to make congressional power more legitimate through proportional representation, so that the body could plausibly claim to represent all Americans. The best evidence that Madison and others privileged national over southern values comes from the fact that James Wilson of Pennsylvania joined their cause. More than Madison, Wilson had firsthand experience with mobs. Wilson, more than any other delegate, envisioned Americans as a national people. Though he criticized Parliament's legislative authority before the revolution, Wilson never denied that a national people can police themselves through their legislature. As was increasingly true with all the leading colonists, Wilson felt estranged from Parliament because he could not vote for its members, but he never criticized its power to police. Police power had to come from democratic processes, Wilson acknowledged, but national majorities more than local ones would naturally gravitate to Enlightenment principles of justice.[37]

Both Madison and Wilson understood that trusting law to the arms of citizens locally organized was a risky business. Although most historians have not dwelled on the point, Madison envisioned giving the Congress police powers—"all the necessary means" to guard "the safety, liberty, and happiness of the Community." Indeed, Jefferson feared that the new Constitution Madison had helped craft would give the national government too much power against mobs and popular rebellions.[38]

Madison's plan posed a sharp challenge to those delegates at the convention dedicated to protecting the states' police powers. If nationalist northerners fought southern defenders of local policing in Philadelphia, then we would have to conclude that southerners had a determination to keep control local and away from Enlightenment principles peculiar to their region. But all of those rushing to fend off threats to local policing did not come from the South. One day after Randolph unveiled the Virginia Plan, Roger Sherman of Connecticut struck back. Madison wrote that Sherman did not seem "disposed to Make too great inroads on the existing system."[39] In July, after the Committee of the Whole had endorsed Madison's idea of giving the new Congress the power to veto acts of state legislatures, Sherman spoke again, "observing that it would be difficult to draw the line between the powers of the Genl. Legislatures, and those to be left with the States." Difficult indeed; Sherman and all the other delegates knew that Madison had proposed turning Congress into a kind of Parliament. And Parliament legislated on everything, including internal policing. Madison proposed giving Congress power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."[40] Sherman replied that "matters of internal police" must be left to the states only.[41] Luther Martin agreed with Sherman. A native of New Jersey who moved to Maryland and Virginia, Martin insisted that the states came before the Union and for that reason had certain inherent powers the national government could never touch.[42]

Sherman and Martin represented the sense of the convention on the proper place for policing. It is unlikely that either Sherman or Martin wanted to keep policing in the hands of the states as a way of protecting slavery. Martin, after all, denounced slavery, most particularly after the convention ended, during the ratification debates. South Carolina's two Charles Pinckneys, unquestionably determined to guard slavery against a newly empowered national government, sometimes sided with Madison on questions of national power. Like Madison, they also wanted to expand the pow-

ers of Congress, no doubt to better negotiate markets for their staple crops. But while the Pinckneys wanted a stronger nation on questions of commerce and can be called nationalists, they would not have so undermined the states' sovereignty as to shift any portion of their state's power of slavery to the national government.[43]

Don E. Fehrenbacher has observed that the convention was not, in fact, free to do whatever it wanted regarding slavery.[44] That the same might be said of the police power can be shown through the writings of Pennsylvania Federalist Tenche Coxe. Coxe denied that the convention wanted to annihilate state sovereignty. State powers, he wrote, "are so requisite to our system, *that they cannot be dispensed with*."[45]

Some in the states feared that the new Constitution would dispense with some state power, if not through Congress then through the new judiciary. A powerful federal judicial system might encroach on the states' police power monopoly, these critics feared.[46] Their fears were not entirely misplaced. The first generation of federal judges included several who believed that they were not bound by a literal reading of their powers enumerated in Article III and expected to punish violators of a federal common law of crimes. James Iredell changed his mind on this point, first telling a grand jury (in 1792) that it could indict crimes "derived from the Legislature alone." Yet within two years, he told another grand jury that they could act even where the legislature had made no provision. District judge Richard Peters vigorously argued that the act of establishing a government implied powers, including the power to defend itself. "Whenever an offense aims at the subversion of any federal institution or at the corruption of its public officers, it is an offense against the well being of the United States; from its very nature it is recognizable under their authority."[47] If those judges were right, then their power might ultimately threaten the states' authority to leave mobs alone, to leave whites free to violently abuse black people. The British common law, after all, empowered judges to punish mobs and rioters, as American lawyers read in their Blackstone.[48]

There is, however, reason to doubt that even these most nationalistic judges really expected to use federal judicial power against mobs. In addition to arguing for a federal common law of crimes when those crimes threatened federal institutions, Peters very famously backed down in the face of state-sanctioned popular opposition to one of his opinions. The reason for his "prudence," as he called it, was that the mass of the people seemed against

him. The case went back to the Revolutionary War, when Pennsylvania had quarreled with a group of private citizens over who had captured a British sloop with a cargo of arms bound for the British army in New York. In 1809, as the U.S. District Court judge in Pennsylvania, Peters ruled in favor of the private citizens, but when state officials defied his order, even calling out the state militia, he "prudently" withheld his decree. He did so in the face of an armed force arrayed against him, sanctioned by state authorities.[49] Judges very carefully refused to use the common law to extend the treason law to include nonmilitary rioting. In 1807, the Supreme Court quoted Lord Hale to find that "not every unlawful or riotous assembly of many persons to do an unlawful act . . . makes a levying of war; for then every riot would be treason." For federal prosecutors to act, the mob must take on the appearance of war, with colors flying, formed into companies, and displaying military weapons, swords, pikes, and halberds.[50] In 1812, the U.S. Supreme Court not only ruled that there was no federal common law of crimes but did so unanimously and without hesitation, dismissing the whole idea in eight quick paragraphs that left no room for dispute.[51] Into the Civil War years, the federal judiciary posed no danger to the states' police powers.

That the Constitutional Convention left too much power in the states, where majorities could abuse minority groups, was recognized by Alexis de Tocqueville in 1835. In his famous book, *Democracy in America*, Tocqueville admired American egalitarianism but criticized the "irresistible strength" of majoritarianism. In America he found a shortage of guarantees against tyranny by the majority, leaving the victims of injustice little recourse. They could hardly appeal to public opinion—that "public" was the majority supporting the tyranny. The legislative and executive branches could offer no solace, as they merely represented the majority and obeyed it blindly. The police? "They are nothing but the majority under arms." The courts were no better, Tocqueville complained, as they were similarly dominated by the majority.[52]

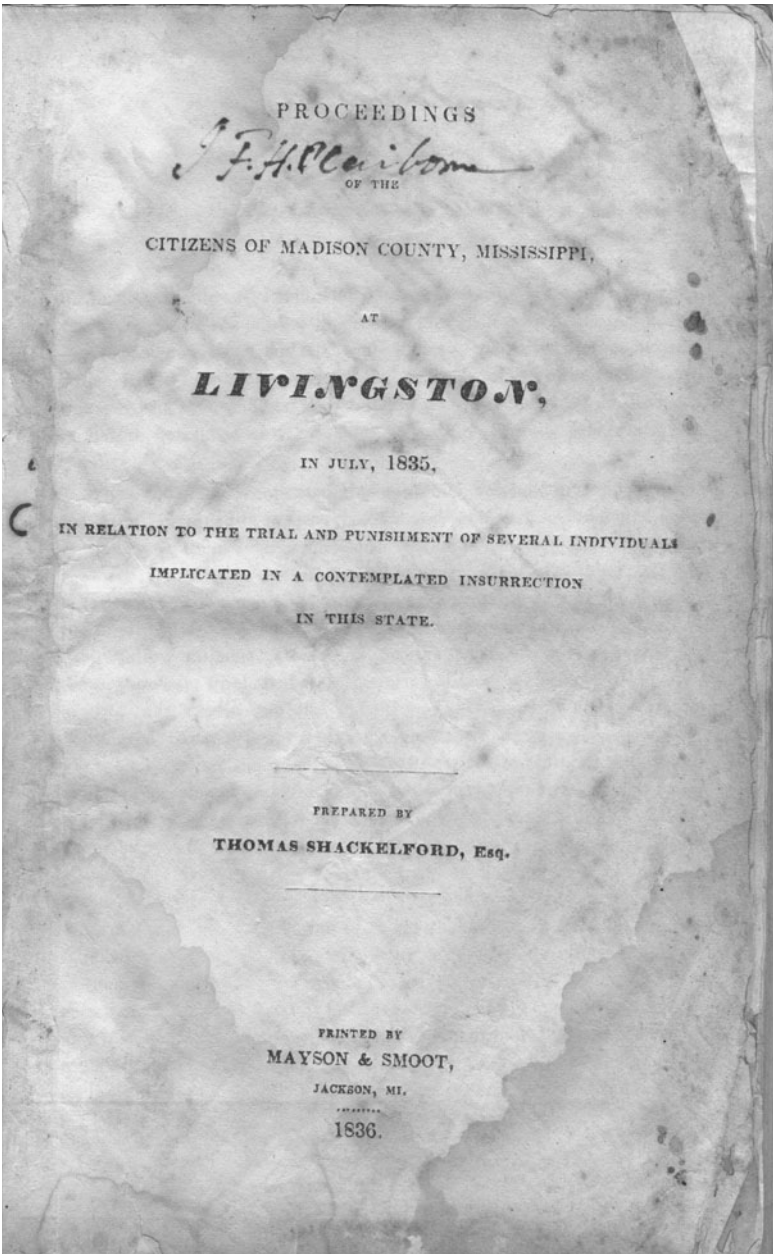
Tocqueville recognized that Madison and the other Framers had tried to limit majoritarianism in the federal Constitution, but, he wrote, "it is the state governments which really control American society." In the states, majorities ruled, all the more so because of the way their local governments had been structured. The framers of the state constitutions "sought further artificially to increase this natural strength of the majority."[53] Within the states, elected officials too often tolerated violent mobs as extralegal expres-

sions of majoritarianism. He particularly worried about the new states of the Southwest, where "the people's habits are too rough" and enlightenment had yet to overcome the wilderness.[54]

When Tocqueville toured America, vigilantism and mobbing pervaded the new states of Alabama and Mississippi, the old Southwest. In Alabama, "Slickers" flogged horse thieves, rogues, and counterfeiters without trial. In Mississippi "respectable citizens" flogged gamblers in an action imitated up and down the Mississippi and Ohio Valleys. A "Committee of Safety" tortured whites and blacks thought to be involved in a potential slave insurrection.[55] By the 1830s, Americans understood that local majorities could act violently outside the law against crime if that crime threatened the survival of the community. Slave uprisings certainly qualified, but so did conspiracies of white people. Communities could form crowds and act violently outside the law without fear of legal retribution. They would not be sued. They would not be indicted. State troops rarely marched into their towns or counties to restore order.

In 1835, Americans were transfixed by two spasms of extralegal killings carried out by white southern crowds on behalf of their communities. Newspapers all over the country reported these events, and in both instances, local writers published defenses of their community's actions, invoking the rule that if a community overwhelmingly endorsed the violence, then it was legitimate. These detailed defenses of lawlessness—written in Mississippi—represented most Americans' thinking about democracy after the Constitutional Convention. These texts reveal the powerful role local public opinion played in nineteenth-century America. The defense narratives went to a national audience, as newspapers across the country reprinted their articles. The entire nation tolerated the violence, seeing the killings as "democratic."[56]

In 1835, rumors flew through Madison County, Mississippi, that local slaves were conspiring to kill white people, sparking panicky investigations and extralegal executions of the supposed ringleaders. Thomas Shackelford published the proceedings of the Madison County lynchers as a booklet, freely acknowledging that Madison County whites tortured black suspects to extract confessions (figure 9). Fifty miles to the east, in Vicksburg, a mob hanged five gamblers after they threatened the town, overawing the local militia company. The editor of the *Vicksburg Register* published the proceedings in his county as an article, one that other papers reprinted. The existence of these two texts demonstrated the authors' concern with public opinion: Shackelford and the *Register* clearly wanted to defend their



PROCEEDINGS

OF THE

CITIZENS OF MADISON COUNTY, MISSISSIPPI,

AT

LIVINGSTON,

IN JULY, 1835,

IN RELATION TO THE TRIAL AND PUNISHMENT OF SEVERAL INDIVIDUALS IMPLICATED IN A CONTEMPLATED INSURRECTION IN THIS STATE.

PREPARED BY

THOMAS SHACKELFORD, Esq.

PRINTED BY

MAYSON & SMOOT,

JACKSON, MI.

1836.

FIGURE 9. Shackelford booklet. Courtesy of Mississippi Department of Archives and History, Jackson.

communities against criticism by reporting that local whites fully supported the mock trials whites used to suppress the alleged insurrection conspiracy.

In Madison County, reports of slave unrest "awakened the people in a measure from their lethargy," Shackelford wrote. The citizens promptly gathered "at a large and respectable meeting."[57] Having formed an investigating committee on behalf of the whole (white) population, "the people" questioned and tortured two black witnesses. According to Shackelford, "these developments" circulated throughout the county, convincing "the people that a conspiracy was on foot."[58] Shackelford wrote that a "general impression" formed in the mind of the public supposing that "negro preachers" must be the ringleaders. "The citizens assembled in the various meetings" agreed "by common consent" that the ringleaders must be hanged immediately as a way of striking terror among the other conspirators. The "whole community" demanded the executions, Shackelford wrote.[59]

Shackelford wrote that on July 2, 1835, after they had begun their investigation—indeed, had begun torturing witnesses and hanging suspects—Madison County whites clashed over who exactly represented or constituted "the people." On July 2, "a most alarming excitement" interrupted whites' extralegal investigations into the alleged conspiracy. Shackelford never explained who was alarmed. No doubt the slaves found the whites' conduct quite alarming, but Shackelford cared little for their feelings: his narrative is a white story, told from the white point of view. Shackelford wrote that "an infuriated people" took two black suspects from the investigating committee's custody and immediately hanged them without trial—that is, without even a mock trial outside formal law or due process. A lynch mob had interrupted the lynchers. Before this point in the narrative, Shackelford had several times described the investigating committee as "the people" or "the citizens," but when he got to July 2, he seemed to realize that the committee did not in fact represent all or perhaps even most white people. The committee itself was engaged in lynching on behalf of "the people," yet a mob had seized two of the committee's prisoners and lynched them, also in the name of the whole people. According to Shackelford, the committee took this development seriously and resolved to speed up its deliberations, moving efficiently to identify the conspirators. In effect, the committee resolved to better represent the people by killing black people more promptly.[60]

Some kind of public proceeding had to take place to solemnize this commitment to faster hanging. Shackelford wrote that on July 3, "a vast concourse" of people assembled in Livingston from adjoining neighborhoods.

Perhaps 160 whites assembled, coming from Hinds as well as Madison County. This was the first meeting that could claim to represent all white people in the area, not those from a particular neighborhood. This group elected thirteen freeholders to form a committee to act for the safety of the people.[61] Shackelford wrote that "the vast concourse" initially assembled at 9:00 a.m.; within one hour the committee of thirteen began its trial of Joshua Cotton, a white man accused of organizing the conspiracy. Cotton confessed, and the committee hanged him the next day, July 4. Cotton's confession seemed to confirm the guilt of William Saunders, and the committee executed him as well, also on July 4.[62] From Shackelford's perspective, Madison County whites acted not within the formal rule of law but definitely inside the parameters of natural law as recognized in American culture. He introduced his narrative by asserting that "the principle of self-defense," "the first law of nature," justified the citizenry's actions. He invoked a universal principle carried out by "the citizenry"—that is, "everyone" in the county. Shackelford wrote that the citizens acted for "all which we hold most dear in this world" between "the cold reasoning of statesmen and lawyers, and the vituperations of fanatics at a distance."[63]

In Vicksburg at about the same time, whites evidenced the same commitment to their "rights" over formal technicalities of law. United public opinion was thought to legitimize extralegal violence. The *Vicksburg Register* wrote that "so far as we know, public opinion, both in town and country, is decidedly in favor of the course pursued." "We have never known the public so unanimous on any subject," the editor enthused, pronouncing himself "proud of the public spirit" displayed by the citizenry acting outside the law. The *Register* explained that for years, professional gamblers had ravaged the city. "Here, as everywhere else, the laws of the country were found wholly ineffectual for the punishment of these individuals," the *Register* reported. The streets echoed their drunken and obscene mirth, they lured innocent youth into their ranks, and they grew ever bolder, insulting good citizens and defying local government. The final straw came on the Fourth of July, when Vicksburgers had gathered for a barbecue to celebrate the holiday, only to be interrupted by rowdy gamblers who humiliated the local militia company.[64]

With the militia proven ineffectual, a crowd of ordinary citizens gathered and marched to the roughest part of town, where they exchanged gunfire with the gamblers. According to the *Register*, this was the population united against villainy, and villainy proved no match. The crowd seized five gam-

blers and hanged them, leaving their bodies on display as a lesson to others. There would be questions asked—not by the Vicksburgers, the *Register* insisted, but by outsiders unaware of just how united public opinion had been. While willing to accept some censure, the *Register* warned against "sickly sensibility or mawkish philanthropy."[65]

There can be little doubt that Shackelford and the *Register* exaggerated the unanimity of white support for the lynchings in Madison and Warren Counties. The important point is that they understood how to defend the violence: by claiming local popular support, by insisting that the lynchers represented "the citizens" or "the people." This rhetoric was effective. Rather than denouncing the Madison County proceedings or rushing militia troops into the county to restore order, Mississippi governor Hiram George Runnels proposed arming the lynchers. Runnels wrote a letter to the Madison County vigilance committee that he closed by expressing his "sincere hope that by your vigilance you may be enabled to protect yourselves against all danger from a deep laid conspiracy."[66] This was no isolated expression of support. Legislatures across the South responded to the Madison County proceedings by defending slavery and denouncing abolitionists. Maryland's governor charged abolitionists with promoting servile war.[67]

A year after the lynchings in Madison and Warren Counties, Runnels's successor as Mississippi governor, Charles Lynch, still defended the lawlessness. "Our government," he said, has to be "fairly and fully bottomed on the sovereignty of the people." Lynch then went on to denounce gradual and immediate abolitionism, "incendiary movements" that excited indignation and disapprobation. "Mississippi has given a practical demonstration of feeling on this exciting subject that may serve as an impressive admonition to offenders; and however we may regret the occasion we are constrained to admit that necessity will sometimes prompt a summary mode of trial and punishment unknown to the law."[68]

The same year that the governor of Mississippi endorsed lawless policing, a state judge in St. Louis published a longer and more detailed analysis of just when legal authorities had to accept popular policing. In May, after Francis McIntosh had knifed to death a deputy sheriff, a crowd chased him to a pasture behind the city, intending to hang him on the spot. But a larger crowd flooded into the pasture with a different idea: "Burn him!" they chanted. This step toward greater barbarity may have been incited by the fact, as reported in the press, that the deputy had been popular and well liked and had a young son whose loud grief-stricken shrieks apparently

swayed those who heard his piteous cries. McIntosh's skin color must have further incited whites; newspapers reviled him as a "yellow fellow," meaning he had a mixed-race heritage. In any case, perhaps five hundred whites, "leading citizens" according to the press, not only burned McIntosh alive but yelled for the fire to be made low and slow to increase the pain inflicted.[69]

Thereafter, the ironically named Luke Lawless, judge of the circuit and county of St. Louis, charged a local grand jury on how to proceed in the face of such an obvious affront to the local authorities. If the jurors felt that only a small number of individuals, clearly distinct from the mass of the population, carried out the crime, he said, then they should indict the perpetrators. Lawless clearly did not think that was the case, however. "If, on the other hand," he continued, the "destruction" of McIntosh "was the act . . . of the many—of the multitude, in the ordinary sense of these words—not the act of numerable and ascertainable malefactors, but of congregated thousands, seized upon and impelled by the mysterious, metaphysical, and almost electric phrenzy, which, in all ages and nations, has buried on the infuriated multitude deeds of death and destruction—then I say, act not at all in the matter—the case then transcends your jurisdiction—it is beyond the reach of human law."[70]

For students of southern distinctiveness, the question these cases raise in the context of American constitutionalism is whether the toleration by southern governors and judges of bloody mob violence, albeit enabled by the federalism written into the U.S. Constitution, marked the American South as a distinctively violent region. Was it a place, perhaps, where democracy went horribly astray not so much because of Madison's failure to curb state sovereignty at the Constitutional Convention as because of cultural peculiarities unique to the South? The idea that the American South stands apart from a more progressive national culture has long held a powerful grip on the American imagination.[71] Scholars seeking to understand white southerners' predilection for mayhem have almost always sought social and cultural explanations; they look inward rather than outward to national constitutional structures.[72] While law served an important cultural purpose, it was not truly an independent variable: "the community itself was the ultimate peacekeeper," one cultural historian has written. The southern culture perpetuates itself, and its ideas about ordering come from within, according to this view.[73]

This essay began with Howard Zinn's observation that the South's racism defined the essence of the nation. It would be better to say that our

essence depended on a particular understanding of human nature. Madison famously questioned whether men could be angels, doubting whether people in small groups could be trusted to reach Enlightenment principles of justice. Those doubts led to checks and balances against an overreaching national government.[74] Madison and the Founders did rather less well in the states, however, where they chose to trust local majorities to govern. That faith in human nature led to a constitutional system where local majorities determined who got due process and who did not. Southern distinctiveness and slavery flourished in the Founders' faith in men's angelic qualities, democratically expressed. That faith transcended the sections, mattered more than southern culture, more than honor, more, even, than the economics of slavery. That national faith tied the nation together, North and South, made the Constitution, and allowed extralegal violence. In that sense, all the Founders, not just the southern ones, wrote not a proslavery Constitution but a pro-lynching one.

NOTES

1. Responding to a 1985 speech by conservative Republican Ed Meese favoring an originalist interpretation of the Constitution, Paul Finkelman argued that slavery played a more decisive role than earlier scholars allowed. See Edwin Meese, Speech before the American Bar Association, July 9, 1985, reprinted in *The Great Debate: Interpreting Our Written Constitution* (Washington, D.C.: Federalist Society, 1986); Paul Finkelman, "A Covenant with Death: Slavery and the U.S. Constitution," *American Visions* 1, no. 3 (1986): 21–27; Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. Richard Beeman, Stephen Botein, and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987), 188–225; Paul Finkelman, "The Constitution and the Intentions of the Framers: The Limits of Historical Analysis," *University of Pittsburgh Law Review* 50, no. 2 (1989): 349–97.

2. George William Van Cleve, *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic* (Chicago: University of Chicago Press, 2010); Robin Einhorn, *American Taxation, American Slavery* (Chicago: University of Chicago Press, 2006); David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009).

3. Howard Zinn, *The Southern Mystique* (New York: Knopf, 1964), 218.

4. Ibid.

5. Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Knopf, 1992), 7; Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Harvard University Press, 1967); Gordon S. Wood, *The Creation of the American Republican, 1776–1787* (New York: Norton, 1969).

6. Gordon S. Wood, "Democratization of Mind in the American Revolution," in *The Moral Foundations of the American Republic*, ed. Robert H. Horwitz, 2nd ed. (Charlottesville: University Press of Virginia, 1979), 102–28. For mobbing, see Gordon S.

Wood, "A Note on Mobs in the American Revolution," *William and Mary Quarterly*, 3rd ser., 23, no. 4 (1966): 635–42; Pauline Maier, "Popular Uprisings and Civil Authority in Eighteenth-Century America," *William and Mary Quarterly*, 3rd ser., 27, no. 1 (1970): 3–35; John Phillip Reid, *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution* (University Park: Pennsylvania State University Press, 1977).

7. Frederick Douglass, *My Bondage and My Freedom* (New York: Miller, Orton, and Mulligan, 1855), 64.

8. Frederick Douglass, *The Frederick Douglass Papers*, ed. John Blassingame (New Haven: Yale University Press, 1982), ser. 1, 3:153.

9. Most sectors of society examined lynching critically before historians. For sociology, see James Elbert Cutler, *Lynch-Law: An Investigation into the History of Lynching in the United States* (1905; Montclair, N.J.: Patterson Smith, 1969); Arthur F. Raper, *The Tragedy of Lynching* (Chapel Hill: University of North Carolina Press, 1933); John Dollard, *Caste and Class in a Southern Town* (New Haven: Yale University Press, 1937). Hollywood director Fritz Lang made a 1936 movie about lynching, *Fury* (Metro-Goldwyn-Mayer). Two iconic works of fiction looked at lynching long before historians did. See William Faulkner, *Intruder in the Dust* (New York: Random House, 1948); Harper Lee, *To Kill a Mockingbird* (New York: Harper and Row, 1961). The first historians to look at lynching focused on a white victim, Leo Frank. See C. Vann Woodward, *Tom Watson: Agrarian Rebel* (New York: Macmillan, 1938); Leonard Dinnerstein, *The Leo Frank Case* (New York: Columbia University Press, 1966). Woodward hardly noticed black lynching in his influential book, *Origins of the New South, 1877–1913* (Baton Rouge: Louisiana State University Press, 1951). The first academic book to look at black lynching appeared in 1979. See Jacquelyn Dowd Hall, *Revolt against Chivalry: Jessie Daniel Ames and the Women's Campaign against Lynching* (New York: Columbia University Press, 1979). Two very detailed narratives with slight analysis followed. See James R. McGovern, *Anatomy of a Lynching: The Killing of Claude Neal* (Baton Rouge: Louisiana State University Press, 1982); Howard Smead, *Blood Justice: The Lynching of Mack Charles Parker* (New York: Oxford University Press, 1986). Many books have subsequently been published. See Stephen J. Whitfield, *A Death in the Delta: The Story of Emmett Till* (New York: Free Press, 1988); George C. Wright, *Racial Violence in Kentucky, 1865–1940: Lynchings, Mob Rule, and "Legal Lynching"* (Baton Rouge: Louisiana State University Press, 1990); Dennis B. Downey and Raymond M. Hyser, *No Crooked Death: Coatesville, Pennsylvania, and the Lynching of Zachariah Walker* (Urbana: University of Illinois Press, 1991); W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virginia, 1880–1930* (Urbana: University of Illinois Press, 1993); Stewart E. Tolnay and E. M. Beck, *A Festival of Violence: An Analysis of Southern Lynchings, 1882–1930* (Urbana: University of Illinois Press, 1995); Dominic J. Capeci Jr., *The Lynching of Cleo Wright* (Lexington: University Press of Kentucky, 1998); James H. Madison, *A Lynching in the Heartland: Race and Memory in America* (New York: Palgrave, 2001); Christopher Waldrep, *The Many Faces of Judge Lynch: Extralegal Violence and Punishment in America* (New York: Palgrave Macmillan, 2002); Michael J. Pfeifer, *Rough Justice: Lynching and American Society, 1874–1947* (Urbana: University of Illinois Press, 2004); William D. Carrigan, *The Making of a Lynching Culture: Violence and Vigilantism in Central Texas, 1836–1916* (Urbana: University of Illinois Press, 2004); Margaret Vandiver, *Lethal Punishment: Lynchings and Legal Executions in the South* (New Brunswick: Rutgers University Press, 2006); Amy Louise Wood, *Lynching and Spectacle: Witnessing Racial Violence in America, 1890–*

1940 (Chapel Hill: University of North Carolina Press, 2009); Christopher Waldrep, *African Americans Confront Lynching: Strategies of Resistance from the Civil War to the Civil Rights Era* (Lanham, Md.: Rowman and Littlefield, 2009). Western lynching has attracted some attention. See Richard B. McCaslin, *Tainted Breeze: The Great Hanging at Gainesville, Texas, 1862* (Baton Rouge: Louisiana State University Press, 1994); Stephen J. Leonard, *Lynching in Colorado, 1859–1919* (Boulder: University Press of Colorado, 2002).

10. Eliga H. Gould, "Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772," *William and Mary Quarterly*, 3rd ser., 60, no. 3 (2003): 471–510; Christopher Tomlins, *In a Wilderness of Tigers: The Culture of Violence, the Discourse of English Colonizing, and the Refusals of American History*, Working Paper 2105 (Chicago: American Bar Foundation, 2001). In 1669, Virginia passed "An Act about the Casuall Killing of Slaves" that began by noting that "the obstinacy" of "refractory servants" cannot "by other then violent meanes [be] suppresst" and then permitted the killing of slaves without legal consequence. "If any slave resist his master . . . and by the extremity of the correction should chance to die, that his death shall not be accompted felony, but the master . . . be acquit from molestation." By law, then, Virginians made certain that no legal procedure or rule of due process stood between a master and his slave. See William Waller Hening, ed., *The Statutes at Large* (New York: Bartow, 1823), 2:270. The 1690 South Carolina law authorized all persons, even slaves, to apprehend runaways. In fact, the law subsidized such private policing, paying a reward to private citizens who apprehended runaways. Even the structure of the militia law suggested an ad hoc quality to mobilizing soldiers for duty. Militia captains had to "raise a convenient party of men" to capture or kill fugitives. Since every white man was a militiaman, this meant that the way a militia captain put together a platoon or company did not materially differ from the way lynch mob organizers formed a mob. The leading historian of slave patrolling recognizes these militia units as the first slave patrols in North America. See Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Cambridge: Harvard University Press, 2001), 14–18.

11. The best definitions of police power were written by the Supreme Court after the Civil War. "This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of any existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property" (*Slaughterhouse Cases*, 83 U.S. 36 [1873]). Three years later, the Court said, "Under [the police] power the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his property, when such regulation becomes necessary for the public good" (*Munn v. Illinois*, 94 U.S. 113 [1877]). In both of these cases and others, the Court said that this power resided in the states and not in Congress.

12. William B. Willcox et al., eds., *The Papers of Benjamin Franklin* (New Haven: Yale University Press, 1959–), 22:122; "Silas Deane's Proposal to Congress, November 1775," in *Letters of Delegates to Congress, 1774–1789*, ed. Paul H. Smith (Washington, D.C.: Library of Congress, 1976–2000), 2:418.

13. Milton E. Flower, *John Dickinson, Conservative Revolutionary* (Charlottesville: University Press of Virginia, 1983), 160; Worthington C. Ford, ed., *Journals of the Continental Congress, 1774–1789* (Washington, D.C.: U.S. Government Printing Office, 1904–37), 5:547, 552.

14. Thomas Burke of North Carolina complained that Dickinson had been willing to give the states power only over their "internal police" and consequently feared that the

Articles would resign "every other power" (Thomas Burke to the Governor of North Carolina, April 29, 1777, in Edmund C. Burnett, ed., *Letters of Members of the Continental Congress* [Washington, D.C.: Carnegie Institution, 1921–36], 2:345–46).

15. William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon, 1765), 1:156–61.

16. I. Radzinowicz, "The Waltham Black Act: A Study of Legislative Attitude toward Crime in the Eighteenth Century," *Cambridge Law Journal* 9, no. 1 (1945): 57.

17. The Ku Klux Klan Act, *Statutes at Large and Proclamations of the United* States (Boston: Little, Brown, 1873), 17:13–14; An Act for the More Effectual Punishing Wicked and Evil-Disposed Persons Going around in Disguise, 1723, 9 Geo. I, c. 22; An Act for Continuing an Act for the More Effectual Punishing Wicked and Evil-Disposed Persons Going around in Disguise, 1737, 10 Geo. II, c. 32; E. P. Thompson, *Whigs and Hunters* (London: Lane, 1975); Eveline Cruickshanks and Howard Erskine-Hill, "The Waltham Black Act and Jacobitism," *Journal of British Studies* 24, no. 3 (1985): 358–65; John Broad, "Whigs and Deer-Stealers in Other Guises: A Return to the Origins of the Black Act," *Past and Present* 119 (1988): 56–72; Pat Rogers, "The Waltham Blacks and the Black Act," *History Journal* 17, no. 3 (1974): 465–86.

18. An Act for the More Effectual Bringing to Justice Any Persons Concerned in the Barbarous Murther of Captain John Porteous, 1737, 10 Geo. II. c. 35.

19. Pfeifer, *Rough Justice*, 9; An Act for the More Effectual Bringing to Justice Any Persons Concerned in the Barbarous Murther of Captain John Porteous, 1737, 10 Geo. II. c. 35.

20. Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (New York: Columbia University Press, 2005), 63–77; Steven L. Kaplan, *Bread, Politics, and Political Economy in the Reign of Louis XV* (The Hague: Nijhoff, 1976), 12; Mark Neocleous, *The Fabrication of Social Order: A Critical Theory of Police Power* (Sterling, Va.: Pluto, 2000); Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993), 35–59.

21. Einhorn, *American Taxation, American Slavery*, 153. Early in the twentieth century, Farrand established the standard view against which Einhorn writes, arguing that slavery played little role at the convention. See Max Farrand, *The Framing of the Constitution of the United States* (New Haven: Yale University Press, 1911). In the 1960s, Lynd anticipated Einhorn when he disputed Farrand to argue that the Framers compromised over slavery. See Staughton Lynd, *Class Conflict, Slavery, and the United States Constitution* (1967; New York: Cambridge University Press, 2009). In 1971, Robinson returned a bit to the Farrand thesis when he wrote that the Founders tried to ignore slavery, seeing it as ungovernable. See Donald L. Robinson, *Slavery in the Structure of American Politics, 1765–1820* (New York: Harcourt Brace Jovanovich, 1971). Writing along similar lines, Fehrenbacher said that slavery had only a muddled and provisional place in the Constitution. See Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 11–47. Beginning the 1980s, Lynd's argument revived, gaining force. See n. 1.

22. Douglass Adair, ed., "James Madison's Autobiography," *William and Mary Quarterly*, 3rd ser., 2, no. 2 (1945): 191–209; Scott J. Kester, *The Haunted Philosophe: James Madison, Republicanism, and Slavery* (Lanham, Md.: Lexington Books, 2008), 103; Jack N. Rakove, *James Madison and the Creation of the American Republic* (Glenview, Ill.: Scott Foresman/Little, Brown, 1990), 1–43.

23. James Madison to Edmund Pendleton, August 6, 1782, James Madison to James Madison Sr., September 8, 1783, in *Papers of James Madison*, ed. William T. Hutchinson et al. (Chicago: University of Chicago Press, 1962–91), 5:27, 7:304.

24. James Madison to Thomas Jefferson, August 12, 1786, in ibid., 9:94. For colonial and revolutionary thinking about human nature, see Rhys Isaac, *Landon Carter's Uneasy Kingdom: Revolution and Rebellion on a Virginia Plantation* (New York: Oxford University Press, 2004), 97–98; Thomas Paine, *Common Sense: Addressed to the Inhabitants of America* (n.p.: 1776), iii.

25. James Madison to George Washington, December 24, 1786, in *Papers of James Madison*, 9:224–25.

26. Pfeifer argues that Americans generally came to prefer "rough justice" over the official kind. See Pfeifer, *Rough Justice*. Brundage makes this argument for a later period in *Lynching in the New South*. For the development of due process in crime fighting, see Karen Halttunen, *Murder Most Foul: The Killer and the American Gothic Imagination* (Cambridge: Harvard University Press, 1998); Daniel A. Cohen, *Pillars of Salt, Monuments of Grace: New England Crime Literature and the Origins of American Popular Culture, 1674–1860* (New York: Oxford University Press, 1993); Randolph Roth, *American Homicide* (Cambridge: Harvard University Press, 2009), 27–179.

27. James Madison to James Monroe, December 11, 1784, James Madison to Thomas Jefferson, January 9, 1785, in *Papers of James Madison*, 8:182, 222.

28. James Madison to Thomas Jefferson, January 22, 1786, in ibid., 473.

29. James Madison to Thomas Jefferson, December 4, 1786, James Madison to George Washington, December 24, 1786, in ibid., 9:189, 225.

30. James Madison to James Monroe, October 5, 1786, in ibid., 141; Kester, *Haunted Philosophe*, 109; Drew McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York: Cambridge University Press, 1989), 234; W. B. Allen, "A New Birth of Freedom: Fulfillment or Derailment?" in *Slavery and Its Consequences: The Constitution, Equality, and Race*, ed. Robert A. Goldwin and Art Kaufman (Washington, D.C.: American Enterprise Institute, 1988), 74.

31. James Madison to Thomas Jefferson, March 19, 1787, in *Papers of James Madison*, 9:318–19.

32. Historians have very often treated the Shaysites as economic revolutionaries, victims of an oppressive commercial class, conservative men of wealth. David P. Szatmary, *Shays' Rebellion: The Making of an Agrarian Insurrection* (Amherst: University of Massachusetts Press, 1980), sees the rebellion in class terms; the Shaysites were subsistence farmers more at war with a mercantile class than motivated by political ideology. See Richard Buel Jr., "The Public Creditor Interest in Massachusetts Politics, 1780–86," in *In Debt to Shays: The Bicentennial of an Agrarian Rebellion*, ed. Robert A. Gross (Charlottesville: University Press of Virginia, 1993), 47–56; Joseph A. Ernst, "Shays's Rebellion in Long Perspective: The Merchants and the 'Money Question,'" in *In Debt to Shays*, ed. Gross, 57–80. Leonard L. Richards, *Shays' Rebellion: The American Revolution's Final Battle* (Philadelphia: University of Pennsylvania Press, 2002), writes that the rebels actually fought political tyranny they saw in the Massachusetts legislature. For a close prosopographical examination of the Pelham rebels, see Robert Lord Keyes, "Who Were the Pelham Shaysites?" *Historical Journal of Massachusetts* 28, no. 1 (2000): 23–55. Keyes finds the rebels were well-established members of their community, men with children, median age 33.75. Several had been town selectmen.

33. Stephen E. Patterson, "The Federalist Reaction to Shays's Rebellion," in *In Debt to Shays*, ed. Gross, 101–18.

34. James Madison, Notes on Debates, February 19, 1787, in *Papers of James Madison*, 9:276.

35. Max Farrand, ed., *Records of the Federal Convention of 1787*, rev. ed. (New Haven: Yale University Press, 1966), 1:134. Farrand uses angled brackets to indicate interlineations, material inserted as an afterthought.

36. Ibid., 135.

37. James Wilson, "Considerations on the Nature and Extent of the Legislative Authority of the British Parliament, 1774," in *Collected Works of James Wilson*, ed. Kermit L. Hall and Mark David Hall (Indianapolis: Liberty Fund, 2007), 1:3–30; James H. Read, *Power versus Liberty: Madison, Hamilton, Wilson, and Jefferson* (Charlottesville: University Press of Virginia, 2000), 106–15, 133–35; Charles Page Smith, *James Wilson: Founding Father, 1742–1798* (Chapel Hill: University of North Carolina Press, 1956), 113, 129–39; Kermit L. Hall, introduction to *Collected Works of James Wilson*, ed. Hall and Hall, 1:xiv, xxi; James Wilson, "Of Direct Means Used by the Law to Prevent Offences," in *Collected Works of James Wilson*, ed. Hall and Hall, 2: 1170–74.

38. Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Random House, 1996), 169.

39. Farrand, *Records of the Federal Convention*, 1:35.

40. Ibid., 21.

41. Ibid., 2:25.

42. Rakove, *Original Meanings*, 163.

43. Marvin Zahniser, *Charles Cotesworth Pinckney* (Chapel Hill: University of North Carolina Press, 1967), 88–93; Frances Leigh Williams, *A Founding Family: The Pinckneys of South Carolina* (New York: Harcourt Brace Jovanovich, 1978), 225.

44. Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery*, ed. Ward McAfee (New York: Oxford University Press, 2001), 39.

45. Rakove, *Original Meanings*, 191–92.

46. James Madison denied this. In *Federalist* 45, he wrote that the states would retain authority over their "internal order." See J. R. Pole, ed., *The Federalist* (Indianapolis: Hackett, 2005), 253.

47. Kathryn Preyer, "Jurisdiction to Punish: Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic," *Law and History Review* 4, no. 2 (1986): 223–65; Robert C. Palmer, "The Federal Common Law of Crime," *Law and History Review* 4, no. 2 (1986): 267–324; Stephen Presser, "The Supra-Constitution, the Courts, and the Federal Common Law of Crimes," *Law and History Review* 4, no. 2 (1986): 325–36; Gary D. Rowe, "The Sound of Silence: *United States v. Hudson and Goodwin*, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes," *Yale Law Journal* 101, no. 4 (1992): 919–48.

48. Blackstone, *Commentaries*, 4:142–47.

49. *U.S. v. Judge Peters*, 9 U.S. 115 (1809); Thomas Lloyd, *A Report of the Whole Trial of Gen. Michael Bright and Others; before Washington and Peters* (Philadelphia: Byrne, 1809); *The Whole Proceedings in the Case of Olmstead and Others versus Rittenhouse's Executrices* (Philadelphia: Farrand, 1809).

50. Opinion on the Motion to Introduce Certain Evidence in the Trial of Aaron Burr for Treason, 8 U.S. 470 (1807).

51. *U.S. v. Hudson and Goodwin*, 7 Cranch (U.S.) 32 (1812).

52. Alexis de Tocqueville, *Democracy in America*, trans. George Lawrence, ed. J. P. Mayer (New York: Harper and Row, 1966), 252.

53. Ibid., 246.

54. Ibid., 225.

55. Pfeifer, *Rough Justice*, 15.

56. Edwin Miles, "The Mississippi Slave Insurrection Scare of 1835," *Journal of Negro History* 42, no. 1 (1957): 48–60, emphasizes white hysteria. Laurence Shore, "Making Mississippi Safe for Slavery: The Insurrectionary Panic of 1835," in *Class, Conflict, and Consensus: Antebellum Southern Community Studies*, ed. Orville Vernon Burton and Robert C. McMath Jr. (Westport, Conn.: Greenwood, 1982), 96–127, argues that white anxiety regarding the possibility of slave insurrection was the principal point. Christopher Morris, "An Event in Community Organization: The Mississippi Slave Insurrection Scare of 1835," *Journal of Social History* 22, no. 1 (1988): 93–111, sees the event as an incident in community organization, following the organizational synthesis school of history popular at that time. David Grimsted, *American Mobbing, 1828–1861: Toward Civil War* (New York: Oxford University Press, 1998), 144–50, follows Miles to attack the mythology of a vast insurrection conspiracy, ridiculing whites' fears.

57. Thomas Shackelford, *Proceedings of the Citizens of Madison County, Mississippi, at Livingston in July, 1835* (Jackson, Miss.: Mayson and Smoot, 1836), 6.

58. Ibid., 7.

59. Ibid., 7–8.

60. Ibid., 12–13.

61. Ibid., 13.

62. Ibid., 18–19.

63. Ibid., iii.

64. "The Vicksburg Tragedy," *Vicksburg Register*, July 9, 1835, reprinted in *Lynching in America: A History in Documents*, ed. Christopher Waldrep (New York: New York University Press, 2006), 49–51.

65. Ibid.

66. Hiram George Runnels to M. D. Mitchell et al., July 8, 1835, in Shackelford, *Proceedings*, 36.

67. Miles, "Mississippi Slave Insurrection Scare," 58.

68. Charles Lynch, "Inaugural Address," *Canton Gazette*, January 10, 1836, 1.

69. "McIntosh Burning," *Boston Liberator*, May 21, 1836, reprinted in *Lynching in America*, ed. Waldrep, 54.

70. Luke Lawless, "Judge Lawless' Charge to the Grand Jury," *Missouri Republican*, May 26, 1836, reprinted in *Lynching in America*, ed. Waldrep, 55.

71. Some scholars have challenged this mythology. See Zinn, *Southern Mystique*; Matthew D. Lassiter and Joseph Crespino, *The Myth of Southern Exceptionalism* (New York: Oxford University Press, 2010); Carroll Smith-Rosenberg, *This Violent Empire: The Birth of an American National Identity* (Chapel Hill: University of North Carolina Press, 2010).

72. Bertram Wyatt-Brown, *Southern Honor: Ethics and Behavior in the Old South* (New York: Oxford University Press, 1982); Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the Nineteenth Century American South* (New York: Oxford University Press, 1984); Gilles Vandal, *Rethinking Southern Violence: Homicides in Post–Civil*

War Louisiana, 1866–1884 (Columbus: Ohio State University Press, 2000); Kenneth S. Greenberg, *Honor and Slavery: Lies, Duels, Noses, Masks, Dressing as a Woman, Gifts, Strangers, Humanitarianism, Death, Slave Rebellions, the Proslavery Argument, Baseball, Hunting, and Gambling in the Old South* (Princeton: Princeton University Press, 1996); David Hackett Fischer, *Albion's Seed: Four British Folkways in America* (New York: Oxford University Press, 1989).

73. Fischer, *Albion's Seed*, 191.

74. James Madison, Federalist No. 10, *New York Daily Advertiser*, November 22, 1787.

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The World Made by Laws and the Laws Made by the World of the Old South

Alfred L. Brophy

FOR A GENERATION NOW, a group of scholars has reinvigorated the study of thought in the Old South. That is a tough task for at least two reasons. First, as the title of Drew Faust's *A Sacred Circle* implies, self-identified intellectuals were relatively few. Second, and this is more a product of our limitation than of their world, we have difficulty understanding how smart and well-educated people could support an institution that is so clearly, well, inhuman. Thus, we have difficulty seeing antebellum southerners as intellectuals or as serious thinkers.

Moreover, the actors did themselves a disservice in the way they engaged ideas. A Charleston, South Carolina, mob responded to antislavery literature sent through the U.S. mail in 1835 with a bonfire.[1] Other responses to the abolitionist literature crisis came through the legal and political system. For example, John C. Calhoun wrote a short but suggestive report for a congressional investigation of the power of the states and of the federal government to regulate the mail.[2] A Tuscaloosa County grand jury indicted Robert G. Williams, the New York–based editor of the *Emancipator*, in September 1835 for the abolitionist literature that arrived there the previous summer, even though he was obviously beyond the reach of the court. Tuscaloosa, Alabama's capital and a university town, had been a center of activity for the American Colonization Society.[3] A few years before Williams's indictment, the Tuscaloosa County Court had freed a young man who had been kidnapped in Philadelphia and sold into slavery in Alabama.[4] There was a world of possibilities in the Old South, of paths not pursued—such as gradual abolition of slavery. Still, the far more common response was the proslavery pamphlet or treatise—and sometimes a bonfire.

The violence went beyond burning of pamphlets. A mob murdered abo-

litionist newspaper editor Elijah Lovejoy in Missouri in 1836, and a student murdered the president of Mississippi's Oakland College in 1851, presumably for his pro-Union stance.[5] Professors who appeared insufficiently proslavery were encouraged to move on, as happened with President Howard Malcolm of Georgetown College in Kentucky, who resigned in 1849 amid charges that he was antislavery,[6] and Henry Ruffner of Washington College, who resigned shortly after publishing a lengthy attack on slavery.[7] Francis Lieber's bid to become president of South Carolina College in 1856 was opposed because of his supposed antislavery beliefs.[8] Others, such as Benjamin S. Hedrick at the University of North Carolina in 1856, were outright fired or had to go to extraordinary lengths to show that they were not soft on slavery, as Chancellor F. A. P. Barnard did at the University of Mississippi in 1860.[9]

Even antebellum southerners realized (and in some ways celebrated) that they were less concerned with ideas than were their counterparts in the North. Abel Upshur's essay on "Domestic Slavery," which appeared in the *Southern Literary Messenger* in 1839, explored why slavery was "not favorable to the general diffusion of knowledge." There were, Upshur thought, some structural reasons (in an agricultural society, where many would receive no education, it was difficult to sustain common schools) as well as some cultural ones. "The habits and pursuits of the slave owner" might "make him less patient of the labor of study and less anxious for the acquisition of knowledge."

Such knowledge was not necessary for the slave owners' existence. Yet for the few who would be leaders of southern society, slavery made it possible to spend time in study. Slavery "removes from the student the necessity of personal labor, and gives him time for study; it relieves him from the sordid and distracting cares which, under different systems, are so apt to chill his hopes and discourage his exertions. Hence the mind is less trammeled by forms, and is more independent and free to exert its powers." Then in an unlikely parallel to Ralph Waldo Emerson's "American Scholar," Upshur said, "The school room is not the only means, nor even the *best* means of education." Where "our northern youth pass their leisure hours, for the most part, either in schools or in listening to itinerant speakers," southern youth "are freely thinking for themselves and forming ideas of their own."[10]

Slavery, then, was justified in part because of the leisure time it gave to slave owners. Southerners reiterated this argument until the war. James Henry Hammond's 1858 Mudsill Speech advanced the idea that there must

be a class of people who did the work to make it possible for others to do the thinking.

> In all social systems there must be a class to do the menial duties, to perform the drudgery of life. That is, a class requiring but a low order of intellect and but little skill. Its requisites are vigor, docility, fidelity. Such a class you must have, or you would not have that other class which leads progress, civilization, and refinement. It constitutes the very mud-sill of society and of political government; and you might as well attempt to build a house in the air, as to build either the one or the other, except on this mud-sill. Fortunately for the South, she found a race adapted to that purpose to her hand. A race inferior to her own, but eminently qualified in temper, in vigor, in docility, in capacity to stand the climate, to answer all her purposes. We use them for our purpose, and call them slaves.[11]

Slavery was also justified for how it helped preserve republicanism. In addition to the leisure it gave to masters, it united white people—owners and nonowners alike—to give them a sense of rough equality, as many people, including William and Mary professor Beverley Tucker, argued.[12]

Sometimes legal historians have recognized the central role of judges and lawyers as intellectuals in the Old South. For example, Timothy Huebner's *The Southern Judicial Tradition* presented intellectual-biographical sketches of a number of nineteenth-century jurists.[13] Similarly, William Wiethoff has examined the judges' proslavery worldview in *A Peculiar Humanism* and *The Insolent Slave*.[14] Nearly three decades ago, Michael O'Brien published a meticulous reconstruction of the ideas of lawyer and attorney general Hugh S. Legaré.[15] Such studies offer important insight into the central role of economic thought and support for the market in the Old South and point out ways southern law created—and was created by—the economic and demographic reality of the slaveholding south. Yet historians of the Old South have often focused on those who cut against the grain of southern ideas. O'Brien's magisterial *Conjectures of Order* provides one gauge of how intellectual historians have approached the transmission of ideas in the Old South and the role of those ideas. O'Brien's volumes move from ideas grounded in social experience (a sort of social history of intellectual history) outward. O'Brien moves from the southerners as people of the world (travelers in Europe and Africa and elsewhere) to natural and social science to southerners' interactions with one another through conversations and books. Then the second volume turns to more traditional intellectual history—ideas about history,

economy, philosophy (including proslavery thought), and religion. The book is concerned with southerners' place in the world—as a postcolonial society—as well as with ideas of nationalism and empire. And it emphasizes the romantic ideas of the center part of his study, which themselves emphasized experience and the particular rather than the general. O'Brien's subjects travel in many circles. They move from the remnants of Enlightenment thought in the early nineteenth century to the romanticism of the 1830s–50s to the emergence of pieces of realism in the 1850s. It is a book about idiosyncratic thinkers as well as previously neglected figures.[16]

Much of *Conjectures of Order* is about the cosmopolitan, engaged southerner, which leads to a question about how much the project of intellectual history involves showing creativity, originality, complexity, and connections to the larger intellectual world. Is an intellectual Madagascar of interest? Or do we want to hear more of citizens of the world? Do we care whether southerners responded to Emerson, Thoreau, Whitman, Channing, Parker, and Stowe or to people with whom they might have had more in common—for example, Aristotle, Burke, Bastiat, Guizot, and Carlyle? The engaged, worldly southerners are important creatures to study, but they may lead us to mistake the central character of southern society. Moreover, that Francis Lieber lived here, that Frederick Grimké was born here, that lawyer Jesse Burton Harrison of Lynchburg, or Charles Shaw, who served as an adjunct professor at the University of Virginia, and Henry Ruffner of Washington College—that they all opposed slavery was important, but it is also potentially misleading.[17]

Southern thinkers frequently emphasized experience, order, and utility. John Reuben Thompson, editor of the *Southern Literary Messenger*, told graduates of Washington College in Lexington, Virginia, in 1850 that what was needed was a southern literature "of our own, informed with the conservative spirit, the love of order and justice, that constitutes the most striking characteristic of the Southern mind."[18] Henry St. George Tucker explained with even more precision the role of the southern lawyer in the search for stability. "Lawyers," Tucker told the entering class at the University of Virginia law school in 1841, "are bred to a love of order." His writings testified to that love.[19]

Lawyers, judges, and politicians, moreover, embraced the dominant spirit of utility.[20] In rejecting a slave owner's request that a railroad be held strictly liable for the death of a slave hit by a train car, Georgia Supreme Court Justice Eugenius Nesbit said such a rule would be inexpedient. He opposed the

rule because it was inconsistent with the principle of fault and because it would discourage railroads.[21]

The Old South, then, had some very smart people who spent a lot of their time talking about conservative ideas and justifying their society. We see this in their moral philosophy texts, which taught that considerations of morality should turn in many instances on utility. That idea, in turn, became a key prop to proslavery action, for southerners could not see an end to slavery in a way that led anywhere other than the complete destruction of their society. That position was further bolstered by their histories.[22]

And historians sometimes recognize the importance of lawyers to southern intellectual history. O'Brien, for example, writes early in the first volume of *Conjectures of Order* that lawyers were a key group of southern intellectuals. "The lawyer with his Blackstone, the minister with volumes of sermons and the Bible, the merchant with ledgers and news from Liverpool, the physician with medical textbooks, the journalist, the bookbinder, the bookseller, all these made a child understand that print and ideas mattered."[23] Yet after that acknowledgment of the centrality of law, O'Brien largely abandons those with legal training as objects of study. Of the one hundred or so people who are his focus, few have legal training, fewer still are practicing lawyers, and none are judges.

Yet there are important questions regarding how those with legal training saw their world, how they fit together ideas of history (from ancient Greece and Rome to feudalism, the French Revolution, Haiti, and the United States) with their modes of interpretation. What did the Anglo-American history of protection of property rights teach about the need for security for property? How did southerners' thinking about property change from Jefferson's writings on the abolition of fee tail to the defense of property in humans in the 1830s made by Chancellor James Harper and in the 1850s by Chief Justice Joseph Henry Lumpkin of Georgia?[24]

In addition to Harper, Thomas Ruffin, and Lumpkin, who should be added to the intellectual history of the Old South? Lots of judges. From the U.S. Supreme Court, we should include southerners John Marshall, John Archibald Campbell, John Catron, Peter V. Daniel, William Johnson, James Wayne, and Roger B. Taney.[25] Many state jurists deserve attention as well; the most prominent include William Gaston of North Carolina; Eugenius Nesbit, Henry L. Benning, and Ebenezer Starnes (author of a little-noticed empirical study of slavery that responded to abolitionists' attacks on slavery by attempting to show that enslaved people fared better under slavery than

recently freed slaves) of Georgia;[26] William Brockenbrough, William Robertson, Spencer Roane, and Henry St. George Tucker of Virginia; John Belton O'Neall of South Carolina; and Abner Smith Lipscomb and Oran Milo Roberts of Texas.[27] From Mississippi, there are William Harris, author of the zealously proslavery decision *Mitchell v. Wells*; William L. Sharkey, author of *Hinds v. Brazealle* (which deprived a child of an inheritance left by his father and put the child back into slavery with the father's relatives); Alexander M. Clayton, author of an opinion that upheld a devise to the American Colonization Society; and Alexander Handy, who upheld a devise to slaves and who also dissented from *Mitchell v. Wells*.[28] Also among the nation's leading legal thinkers were southerners Hugh S. Legaré and William Wirt.

The list of lawyers and legislators worthy of study is long. It includes Benjamin Watkins Leigh, who argued forcefully in favor of slavery in the early 1830s, and John Marshall's son, Thomas, who mildly attacked slavery in the Virginia legislature's debate in the wake of Nat Turner's rebellion.[29] Many politicians imported their legal ideas into college literary societies, including Jefferson Davis, James Pettigru, and R. M. T. Hunter.[30] Literary figures with legal training include William Gilmore Simms; John Pendleton Kennedy, whose *Swallow Barn* included a discussion of property law; James Glover Baldwin, whose *Flush Times of Alabama and Mississippi* discusses legal culture in those frontier states in the 1830s; and Augustus Longstreet.[31] Even among southerners without formal legal training, law was a common theme. The book-length responses by southern men and women to Harriet Beecher Stowe's critique of slave law in *Uncle Tom's Cabin* included Caroline Hentz's *Planter's Northern Bride*, St. John's College professor Edward Stearns's *Notes on Uncle Tom's Cabin*, Mary Eastman's *Aunt Phillis' Cabin*, and M. J. McIntosh's *The Lofty and the Lowly*.[32]

A focus on college faculty and those who spoke at colleges helps bridge theory and the active life of politics and law, for those people provide keys to understanding how the motives expressed in the works of intellectuals connect to action. When we ask how our nation's ideals—and the beliefs that circulate throughout the land—impel us from dream, feeling, and idea to political action and then even to violence, we can benefit from looking at those who express those sentiments and then act on them.[33] One of the great problems of intellectual history is to connect ideas to action. This may be one of the gifts that an intellectual history of law can offer us.

Professor (and later president) Thomas Dew of William and Mary is central to antebellum southern thought. Dew's *Reviews of the Debates in the Leg-*

islature in the wake of Nat Turner's Rebellion is a key summation of southern proslavery thought. Dew's colleague, Beverley Tucker, who taught law at William and Mary, included a complex civil suit and criminal prosecutions in his novel *George Balcombe*; Tucker critiqued the statement in Blackstone's *Commentaries* that slavery is inconsistent with natural law, and he frequently lectured on the ways that slavery was necessary for republicanism. Thomas Cobb's five-hundred-page treatise, *An Inquiry into the Law of Negro Slavery*, combines history with law and gives us a comprehensive view of conservative thought, as does Louisiana lawyer George Sawyer's *Southern Institutes*, a legal history of slavery. Albert Taylor Bledsoe, who was trained in law and practiced before teaching at the University of Mississippi and University of Virginia, wrote *Liberty and Slavery*, which defended the idea that freedom is greatest in a society where order is maintained by law. Bledsoe was joined by three University of Virginia colleagues who wrote about natural law—Henry St. George Tucker, George F. Holmes, and James P. Holcombe. Yet standard intellectual histories of the Old South rarely mention the hundreds of volumes of case reports and treatises that represent the well-considered thoughts of some very smart and articulate people.[34]

How, then, does a focus on southern legal thought—in the pages of state and federal reporters, in the treatises and pamphlet literature, and in their fictional literature—affect how we think about southern intellectual history? There are four ways in which legal literature might contribute to the southern intellectual history project and to an understanding of the ways that legal thought is closely connected to economic and social reality.

First, the legal literature can help us clarify some themes in political thought, like the growth of liberalism and the market in the South. Where some historians focus on southerners' antimarket writings, the judicial opinions disclose a distinctly promarket orientation, a theme of growing importance to historians.[35] Here, the opinions confirm the latter picture. Three examples illustrate this point. First, judges limited the liability of tortfeasors, placing blame for loss of life on the slaves rather than the employer.[36] Similarly, judges limited the liability of white people who abused slaves while limiting liability for torts by slaves.[37] Moreover, judges generally protected vested rights against encroachment, although Democrats and Whigs had some significant differences in their approaches. Yet disputes arose as to how such protections might be achieved, and visions about property rights and community interests that mapped Whig and Democratic ideologies clashed. These conflicts were particularly apparent in cases involving the interpre-

tation of charters, where Democratic judges were concerned that charters might be interpreted to grant monopolies (and thus increase consumers' prices), where Whigs were concerned with limiting the state's power to take away property.[38] In other cases, courts limited injunctions to prohibit property owners from interfering with railroads or other businesses. In their place, property owners received modest compensation in the form of payments for the decreased value of their property.[39]

Georgia's Lumpkin illustrates these themes of competition and rationality. In *Shorter v. Smith*, one of his most famous opinions, Justice Lumpkin revealed a promarket disposition that refused an injunction sought by ferry owners against the construction of nearby bridges. Lumpkin easily dismissed the claim in an opinion rich with Whig rhetoric about the importance of competition. Lumpkin would not grant any exclusive rights based on the ferry franchises. He observed that "the continued existence of the government would be of no great value, if by implication and presumptions, it was disarmed of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations." Lumpkin concluded with discussion of the importance of competition: "We have and in the very nature can have, no other protection but that which results from free and unrestricted competition."[40]

The legal theory fits with larger themes in southern intellectual history: to decide cases, judges looked to the context rather than to universal truths and focused on practices that correlated with the ideas of contemporary European thinkers such as Hegel and with the southern reaction to the Enlightenment.[41] Southern intellectuals' writings demonstrate a deep appreciation for the law's dependence on the surrounding moral and economic circumstances and an even deeper respect for property, which is seen as supporting both economic growth and freedom. The idea is that property is a stabilizer.[42] Moreover, law gradually progressed. Southerners wrote about this progress as a gradual adaptation rather than dramatic changes from the common law.[43]

The legal literature also reflects complex ideas. For example, Thomas Cobb's *An Inquiry into the Law of Negro Slavery* creatively read precedent to suggest that international law compelled recognition of slavery everywhere. Cobb believed that comity provided a positive law to support slavery even in jurisdictions where there was no other law supporting it.[44] South Carolina theologian and professor James Thornwell elaborated on this position in his January 1861 pamphlet, *The State of the Country*, which urged seces-

sion. Thornwell drew on the common belief that slavery was nearly ubiquitous in human history and maintained that slavery predated the existence of law.[45] From this he concluded that slavery was not bounded by municipal law but existed as if by nature. Thornwell turned this into an argument that slavery was a national—indeed, international—phenomenon that did not need municipal law to support it. Wherever slave owners went, the law went as well, to protect them. "Slavery is rooted in a common law, wider and more pervading than the common law of England—THE UNIVERSAL CUSTOM OF MANKIND."[46] This idea was evidence of slavery's centrality to southern law. Slavery was the bedrock on which the society rested; the law had to support slavery. These ideas were connected and supported each other. It would be folly to try to break free of these accepted truths. As Thornwell well understood, the conflict over the constitutional protection of slavery was the center of the secession crisis. Southerners were, he grimly concluded, "struggling for our very being."[47]

Southerners also drew on romantic-era ideas when they emphasized the way that law had to fit with its social context, that legal rules needed to be calibrated to the character of the people governed by them. Enlightenment principles of freedom did not fit everyone. Instead, a constitution had to be adjusted to the people it was designed to govern. Virginia lawyer John Randolph Tucker, grandson of St. George Tucker, told the literary societies at William and Mary in 1852,

> The man who writes constitutions by the dozen, and keeps them on hand for use or distribution, without a careful investigation of the social capacities of the people for whom they are designed—he who *guesses* that our institutions would be admirably suited for China or Japan, or that our federative system of republics would work with facility and success under a President Roberts upon the coast of Africa, is a dangerous empiric—a mere pretender, whose reward should be fixed in perpetual banishment from the counsel of a wise people. And in the solitude of an asylum for political lunatics.[48]

Tucker spoke about the reality of life in the South, about the place of enslaved people and about history. He asked whether "any man" could deny that "the most favorable condition for the African is slavery, and the only condition for the Saxon, consistent with his progress or even existence, is that of being director of the physical and moral energies" of the enslaved people.[49]

When Lumpkin simplified the rules regarding conveyancing in 1848, he

thought that he needed to give reasons for the rule he had been using or abandon it in favor of a rule that made more sense. "The nations of the earth are clamoring for bread, they will be put off no longer with a stone. They ask for reasons, they will not be satisfied by mere precedents, however hoary with antiquity. It is quite too late in the age of the world, to substitute words for things, sound for sense, the shadow for the substance."[50] Such language bears a striking resemblance to Emerson's "American Scholar" as well as to southern literary addresses.[51]

However, North Carolina Supreme Court Justice Thomas Ruffin warned against too frequent or too dramatic a modification in the common law in *State v. Ephraim* (1836):

> It is true, that the exigencies of society have, from time to time, obtained, in some instances, judicial modifications of ancient rules of law, but this has been effected by slow and almost imperceptible degrees, and without a recurrence, at those times, to first principles, until a succession of inadvertent departures from the old rule, have so strongly established exceptions to it, that a court subsequently reviewing the whole ground, finds it more difficult and dangerous to attempt to re-establish the principle of its integrity, by retracing the steps of those who had lost sight of it, than to receive and enforce the rule, with its exceptions, all as they came down to us. . . . Courts cannot thus change their position, and frame anew original rules of law, or introduce exceptions not before found, either in terms or in principles.[52]

Second, the legal writers show us how ideas relate to action. Legal thinkers frequently used the technology of law as a support for rather than a weapon against their culture. And while much of the focus should be on how law works in conjunction with culture—judicial and political ideology are, obviously, closely allied—legal doctrine also exercises an independent authority.[53] Politics and considerations of utility are important, but legal ideas have an independent, autonomous power. We often hear in legal scholarship about the ways that law bends the humanitarian sentiments of judges who feel differently about a case from what the law commands. Robert Cover's *Justice Accused* called this the moral-formal dilemma, which placed the moral result in opposition to the formal result required by law.[54] Herman Melville's novella *Billy Budd* and Stowe's *Dred: A Tale of the Great Dismal Swamp* are prominent examples from literature that deal with such subordination of justice to law.[55] And occasionally, when judges acted on their internal moral sentiments instead of the proslavery law, they were criticized.

Cobb believed that Lord Mansfield's antislavery decision in *Somersett's Case*, for example, was based on passion rather than logic. Cobb tersely concluded that the decision "is by no means calculated to advance his fame."[56]

Yet law sometimes provided a counterbalance to judges' proslavery ideas. Tennessee Supreme Court Justice John Catron, who went on to serve on the U.S. Supreme Court, provides one example. His opinion in *Fisher's Negroes v. Dabbs* (1834) freed slaves who had been left by their owner in a trust to be freed but were not. Catron adopted as part of his opinion the trial court's opinion that confessed that he preferred to keep the slaves in slavery. Catron's opinion is convincing on this point. He emphasized the virtues of slavery for both the society and the slave. "Generally and almost universally," Catron wrote, "society suffers and the negro suffers by manumission." However, Catron upheld the will and thus emancipated Fisher's slaves.[57]

Judges allow us to see the impact of moral philosophy, which is a branch of applied ethics. They separate sentiment from reason and apply reason as well as precedent. In 1837, the Mississippi Supreme Court invalidated a slave owner's will that left his estate to his son and the mother of his son, whom he had taken to Ohio and freed some years before. The family returned to Mississippi, where they lived at the time of the man's death. Then, following his death, his other heirs challenged the will; the court looked to Mississippi's statutes limiting emancipation. It grimly concluded that the "laws of this state cannot be thus defrauded of their operation by one of our own citizens."[58] Other opinions in Mississippi and elsewhere are more expansive in their discussion of the evils of emancipation.

Proslavery opinions rarely mention slave owners' love for their slaves. Instead, the opinions speak of the places where masters must have uncontrolled authority over the body of the slave, as in *State v. Mann*; they speak of the need for power, not love; they silence slaves, often refusing to take testimony from them. *Dred Scott*, for example, refused to even let a slave into federal court by denying him the benefits of citizenship. The restrictions on teaching slaves to read likewise reveal an acknowledgment of literacy's power to introduce destabilizing ideas.[59]

Judicial opinions link history and moral philosophy. Catron's opinion in *State v. Foreman* mixed the judge's thought on history, economy, and constitutional law.[60] The opinion, which ran to dozens of pages in the *Tennessee Reports*, asserted Tennessee's right to criminal jurisdiction over a crime on Cherokee territory. Catron surveyed the history of Western Europe's colonization of the Americas to make the case for the right to govern native so-

cieties. He recognized that morality might suggest a different result but asserted that Tennessee had the power—and therefore the right—to punish crimes on Indian land:

> Our claim is based on the right to coerce obedience. The claim may be denounced by the moralist. We answer, it is the law of the land. Without its assertion and vigorous execution this continent never could have been inhabited by our ancestors. To abandon the principle now is to assert that they were unjust usurpers, and that we, succeeding to their usurped authority and void claims to possess and govern the country, should in honesty abandon it, return to Europe, and let the subdued parts again become a wilderness and hunting ground.[61]

Catron's applied ethics taught him the value of rights to soil and to sovereignty; his exploration of history with natives led him to the conclusion that states should continue to exercise power over the Native Americans.

Alabama confronted a similar issue when the state sought to punish a white man for the murder of a Creek Indian. All of the seriatim opinions in *Caldwell v. State* (1832) turned on whether the state had jurisdiction to punish crimes occurring on tribal land located within the state of Alabama.[62] Chief Justice Abner S. Lipscomb upheld Alabama's power to pass legislation punishing murder and thus upheld the death sentence against the white man. Lipscomb used the need to punish the murder to secure the state's jurisdiction over land inhabited by natives. He thus limited native rights of sovereignty. Lipscomb believed that natives had limited rights to the land they inhabited because they did not possess the attributes of sovereignty.[63] Lipscomb employed his understanding of native society to deprive the natives of the rights of sovereignty, finding the native societies nomadic and without an "established system of government."[64] In his words, "the pretension of those who live by the chase, must yield to the cultivator of the soil."[65]

Justice John M. Taylor's opinion surveyed much colonial and national history to assess natives' rights to the land. He recalled that until recent years, the natives had been the "undisputed lords of this immense continent." Some observers might conclude from that history that the natives should maintain sovereignty over the lands they occupy, and "such reflections excite a warm interest in behalf of the Indian, and we listen to his complaints fully prepared to believe that he has been injured. Similar feelings have been general throughout the union, and, doubtless, they have often controlled the intellect, and commanded the judgment, when forming an opinion upon the rights of the states over these rude nations."[66] But those feelings of the heart

did not hold sway in Alabama's courts, for the court justified the continued occupancy of the land.

Taylor found progress in the growth of cities and political institutions, in commerce, and in the development of agriculture. That progress led Taylor to believe that the natives had no claim to sovereignty or land in Alabama. The court found the hand of Providence in the changes: "Are we not compelled to admit that the superintending providence of that Being who first formed the earth, is to be seen in this mighty change?"[67]

Emancipation cases give further illustration of how judges brought their understanding of history and society together with their precedent. Sometimes, as in *Hinds v. Brazealle*, the people the owner tried to free were members of his own family. In other instances, slave owners tried to free dozens or hundreds of people through use of sophisticated trust instruments. Those attempts met with varying levels of success, in part determined by the intricacies of the owners' instructions—such as whether the slaves would be taken out of the state or out of the country or given a choice of whether to stay or go.[68] In other instances, the differences seem to turn on the personal beliefs of the judges; judges from Alabama, for example, were less willing to contemplate emancipation than those in Tennessee.[69]

In *American Colonization Society v. Gartrell* (1857), Justice Lumpkin narrowly construed the American Colonization Society's charter to limit its power to accept a gift of slaves. Lumpkin found that the charter only gave the society power to transport slaves—with the slaves' consent—to Liberia. When Gartrell left slaves in trust to the society to be transported to Liberia, the gift exceeded the society's charter. That almost laughably fine parsing of the document's language in part reflected Lumpkin's opposition to emancipation. He concluded his opinion with a broad condemnation of emancipation and broad praise for the civilizing influence of slavery:

> Under the superior race and no where else, do [slaves] attain to the highest degree of civilization; and any experiment, whether made in the British West India Islands, the coast of Africa, or elsewhere, will demonstrate that it is a vain thing for fanaticism, a false philanthropy, or anything else, to fight against the Almighty. . . . Let our women and old men, and persons of weak and infirm minds, be disabused of the false and unfounded notion that slavery is sinful, and that they will peril their souls if they do not disinherit their offspring by emancipating their slaves![70]

The legal reasons for the narrow construction of the society's charter were bolstered by Lumpkin's understanding of history and contemporary society.

A few years earlier, however, Lumpkin had permitted—over a dissent from Justice Henry Benning—a testator to provide for a slave to be taken outside of the state and freed directly.[71]

Third, legal texts contribute to the history of the book project, for we can trace the influence of ideas with some specificity. We can answer such questions as how did judges use books, and which books did they use? We have hundreds of volumes in which judges explain what they are doing and where their ideas originated. An 1856 Mississippi decision, *Vicksburg and Jackson Railroad Company v. Patton*, distinguished New England cases to show that railroads have a duty to those who pasture their cattle on unenclosed land.[72] In five Confederate-era cases, men who had purchased substitutes for service in the military claimed that their reconscription violated their vested rights; five separate state supreme courts ruled against the men, with rather divergent rationales.[73] Such studies can tell us how ideas migrate from one judge to another; the opinions disclose a multidecade dialogue between judges.[74] Here the sophisticated quantitative techniques that have yielded such insight into the networks of discussion and measures of influence for contemporary judges might be applied. We can begin to measure which judges were most cited and on what issues, as well as how far those citations stretched in time and how many other jurisdictions followed (or distinguished) those judges. That will help set a lower limit on the judges' intellectual circles.

Fourth, the opinions complement pieces of intellectual historians' broad picture. Judges were empirical and concerned with past and future and with the concrete. Judges, like southerners generally, shifted from an Enlightenment to a proslavery romantic world. Law may very well have been more integrated with national thought (perhaps more colonized by the North than in other areas of the intellect). For law was surely conservative—dramatically so—in both North and South. In fact, northerners praised law precisely for its ability to constrain change.[75]

Perhaps southern legal thinkers do not fit so neatly into boxes of Enlightenment and romanticism. Still, some judges invoked key concepts of the romantic era such as light. One Kentucky judge wondered, "Why wander and lose ourselves in the intricate mazes of technicality, when high above our path there gleams the light to guide us in our construction and dispel the darkness with which ingenious counsel have shadowed this subject?"[76] And a Georgia jurist invoked romantic imagery in commenting on the history of slavery and feudalism: "It is a region of mists and fogs and darkness. The

servitude of those times may shed light upon slavery—may illustrate the character of slavery in its first formations—may serve to confirm that idea of title."[77] But more frequently, when antebellum southern jurists invoked romanticism, they did so to criticize rather than uphold the idea.[78]

In an area as important as legal thought that engaged the lives and fortunes of so many people so directly, we ought to pay attention to how closely it was allied to northern thought as well as to how the values of property and slavery were protected by it.

* * *

Just as we accept that southerners sincerely and deeply believed in evangelical Protestantism and in internal improvements, we should accept that they wrote in favor of slavery because that was an issue of exceptional importance to them. In that way, we can see how their legal system worked in conjunction with economic and demographic reality as well as their understanding of history. The laws and the justifications for them were dictated by southerners' understandings of economic and social life.

In addition to thinking, as Anthony Grafton has so brilliantly helped us do, about "worlds made by words," we should be thinking about the world of economy and society that demanded a proslavery law and how proslavery legal thought in turn provided support to the world of the Old South.[79] In recovering the mind of the Old South, we must pay due attention to the place of law in that world. It was a place where abstract intelligence, precedent, and stories about the past and present interacted with cold reality. The codes, Constitution, common law, and treatises provided a framework for understanding and then channeling actions as our country fell apart over fundamental issues of property and slavery. And therein lies a story about our nation's journey toward Civil War based on economic and social realities and the law that was created to sustain and foster those realities.

NOTES

1. See William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816–1836* (New York: Harper and Row, 1965), 340–41 (discussing the abolitionist literature crisis).

2. Clyde N. Wilson, ed., *Papers of John C. Calhoun* (Columbia: University of South Carolina Press, 1980), 16:301.

3. *Documents of the Senate of the State of New York, Fifty-Ninth Session* (Albany: Mack, 1836), 1:2 (reprinting grand jury's indictment and Alabama governor John Gayle's request for Williams's extradition). Gayle had been the vice president of the Auxiliary Col-

onization Society of Alabama. See "State Colonization Society of Alabama," *African Repository* 5 (1830): 379. See also Jeannine DeLombard, *Slavery on Trial: Law, Abolitionism, and Print Culture* (Chapel Hill: University of North Carolina Press, 2006), 51; James Benson Sellers, *Slavery in Alabama* (Tuscaloosa: University of Alabama Press, 1950), 366–67.

4. See Judson Crump, "The Petition for Freedom" (seminar paper, University of Alabama School of Law, Fall 2007).

5. Richard Aubrey McLemore, *A History of Mississippi* (Hattiesburg: University and College Press of Mississippi, 1973), 1:363.

6. Victor B. Howard, *The Evangelical War against Slavery and Caste: The Life and Times of John G. Fee* (Selinsgrove, Pa.: Susquehanna University Press, 1996), 47. Centre College president John C. Young was also antislavery. See *Letters of James Gillespie Birney*, ed. Dwight L. Dumond (New York: Appleton-Century, 1938), 1:277–80; Howard Tallent, *Evil Necessity: Slavery and Political Culture in Antebellum Kentucky* (Lexington: University Press of Kentucky, 2003), 38 (identifying Young as an antislavery conservative).

7. William Gleason Bean, "The Ruffner Pamphlet of 1847: An Antislavery Aspect of Virginia Sectionalism," *Virginia Magazine of History and Biography* 61, no. 3 (1953): 260, 277 n. 39.

8. See Daniel Walker Hollis, *University of South Carolina*, vol. 1, *South Carolina College* (Columbia: University of South Carolina Press, 1951), 177–93.

9. *Record of the Testimony and Proceedings in the Matter of the Investigation of the Trustees of the University of Mississippi . . . of the Charges Made by H. R. Branham, against the Chancellor of the University* (Jackson: Mississippian Office, 1860), 16.

10. Abel Upshur, "Domestic Slavery," *Southern Literary Messenger* 10, no. 10 (1839): 677, 680–81.

11. James Henry Hammond, "Speech to the U.S. Senate, March 4, 1858," *Congressional Globe*, 35th Cong., 1st sess., Appendix 68, 70–71 (1858). I am indebted to Jeannine DeLombard for reminding me of the importance of this speech.

12. Nathaniel Beverley Tucker, "A Note to Blackstone's Commentaries," *Southern Literary Messenger* 1, no. 5 (1835): 227–31.

13. Timothy Huebner, *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890* (Athens: University of Georgia Press, 1999).

14. William Wiethoff, *A Peculiar Humanism: The Judicial Advocacy of Slavery in the High Courts of the Old South, 1820–1850* (Athens: University of Georgia Press, 1996); William Wiethoff, *The Insolent Slave* (Columbia: University of South Carolina Press, 2002).

15. Michael S. O'Brien, *A Character of Hugh S. Legaré* (Knoxville: University of Tennessee Press, 1985).

16. Michael S. O'Brien, *Conjectures of Order: Intellectual Life and the American South, 1810–1860* (Chapel Hill: University of North Carolina Press, 2004), 1:16.

17. See A Citizen of the South [Charles Shaw], *Is Slavery a Blessing? A Reply to Prof. Bledsoe's Essay on Liberty and Slavery: With Remarks on Slavery as It Is* (Boston: Jewett, 1857); [Jesse Burton Harrison], "The Speech of Thomas Marshall in the House of Delegates . . . ," *American Quarterly Review* 12, no. 24 (1832): 379–426; A Slaveholder of West Virginia [Henry Ruffner], *Address to the People of West Virginia Showing Slavery Is Injurious to the Public Welfare* (Lexington, Va.: Noel, 1847).

18. John R. Thompson, *Education and Literature in Virginia: An Address Delivered before the Literary Societies of Washington College, Lexington, Virginia, 18 June, 1850* (Richmond: Ellyson, 1850).

19. Henry St. George Tucker, *An Introductory Lecture Given to the Law Class at the University of Virginia* (Charlottesville: Magruder and Noel, 1841), 7.

20. Among the many examples from judicial opinions that focus on the economic and social utility are *Scroggins v. Scroggins*, 14 N.C. (3 Dev.) 535 (1832) (denying divorce by court order—rather than legislative act—on the grounds that it might make subsequent divorces more common); *Heathcock v. Pennington*, 33 N.C. (11 Ired.) 640 (1850). Debate over the Fugitive Slave Act of 1850 brought out a lot of statements about the need to judge slavery in its context and abolition according to its likely consequences, which many southern (and northern) senators believed would be worse than its continuance. See, e.g., *Congressional Globe*, 31st Cong., 1st sess., 1106 (1850) (Senator John Bell of Tennessee).

21. *Macon & Western R. Co. v. Davis*, 13 Ga. 68 (1853) (rejecting strict liability for death of a slave killed by a railroad): "It would be strange indeed, if the General Assembly had made, or should ever make a citizen or a corporation, in the pursuit of a calling authorized by law, liable for injuries done to the property of another, without fault on the part of the citizen or the corporation, and by the negligence or willful wrong of the owner. Such legislation would be a reproach to the civilization of the age. No such rule of liability is found on the Statute book of any State of this Union, or of Great Britain, and I dare say, never will be found in the legislation of any free State. Besides its oppressive injustice, it would be grossly inexpedient, inasmuch as it would deny to the public the incalculable benefits of Railroads, for no company would long exercise franchises thus encumbered."

22. See, e.g., Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States, to Which Is Prefixed an Historical Sketch of Slavery* (Philadelphia: Johnson, 1858), cxxiv–ccv (discussing recent history of slavery, especially emancipation in Haiti and the United States); Thomas R. Dew, "Professor Dew on Slavery," in *The Pro-Slavery Argument* (Charleston: Walker, Richards, 1852), 287.

23. O'Brien, *Conjectures of Order*, 1:18.

24. William Harper, "Harper on Slavery," in *Pro-Slavery Argument*, 1; *Cleland v. Waters*, 16 Ga. 496 (1854).

25. In addition to his judicial opinions, Campbell wrote and spoke extensively. See John A. Campbell, *Address Delivered before Alumni Society of the University of Georgia* (Athens, Ga.: Peterson, 1853); John Archibald Campbell, *The Institutions, Duties, and Relations of Alabama: An Oration before the Erosophic and Philomathic Societies of the University of Alabama, July 12th, 1859* (Tuscaloosa: Warren, 1859). Campbell's five articles on slavery in the *Southern Quarterly Review* helped establish the key proslavery arguments regarding the ubiquity of slavery and the dangers of emancipation in the decade leading into Civil War. See "Slavery in the U.S.," *Southern Quarterly Review* 12, no. 23 (1847): 91–134; "Slavery among the Romans," *Southern Quarterly Review* 14, no. 28 (1848): 391–432; "British West India Islands," *Southern Quarterly Review* 16, no. 32 (1850): 342–77; "The Rights of the Slave States," *Southern Quarterly Review*, n.s., 3, no. 5 (1851): 101–45; "Slavery throughout the World," *Southern Quarterly Review*, n.s., 3, no. 6 (1851): 305–39.

26. See *Padelford, Fay & Co. v. Savannah*, 36 14 Ga. 438 (1854) (Benning, J.) (concluding, after extensive survey of history of the ratification of the Constitution, that states are coequal with the federal government); *Cleland v. Waters*, 19 Ga. 43 (1855) (Lumpkin, J., with Starnes concurring and Benning dissenting) (upholding will that ordered a slave transported outside of Georgia and emancipated); Henry L. Benning, *Speech on Federal Relations . . . Delivered in the Hall of the House of Representatives, November 6th*

1860 (n.p., [1860]), reprinted in *Secession Debated: Georgia's Showdown in 1860*, ed. William W. Freehling and Craig W. Simpson (New York: Oxford University Press, 1999), 115–44; Ebenezer Starnes, *The Slaveholder Abroad; or, Billy Buck's Visit, with His Master, to England* (Philadelphia: Lippincott, 1860). An appendix reprints Starnes's empirical investigation of the criminal justice system in Georgia and its comparison with the United Kingdom. Starnes sought to portray the United Kingdom as having more crime than Georgia as part of his demonstration that slavery aided the social organization of the United States.

27. See, e.g., *Duncan v. Magette*, 25 Tex. 245 (1860) (analogizing justice to raw gold and law to minted gold coin).

28. *Mitchell v. Wells*, 37 Miss. 235 (1859); William L. Sharkey, *Commencement Address Delivered before the Law Students of the University of Mississippi on the 5th Day of July, 1859* (Oxford, 1859); *Planters' Bank v. Snodgrass*, 5 Miss. (4 How.) 573 (1840) (Sharkey, dissenting); *Mahorner v. Hooe*, 17 Miss. (9 Smedes & M.) 247 (1848); *Hinds v. Brazealle*, 3 Miss. (2 How) 837 (1838). *Hinds* was followed in a number of southern cases, including *Willis v. Jolliffee*, 11 Rich. Eq. 447 (S.C. Eq. 1860). See also *Vance v. Crawford*, 4 Ga. 445 (1848); *Wade v. American Colonization Soc.*, 15 Miss. (7 Smedes & M.) 663 (1846); *Shaw v. Brown*, 35 Miss. 246 (1858) (upholding will devising property to former slaves); *Mitchell v. Wells*, 282 (Hardy, dissenting).

29. *The Speech of Thomas Marshall . . . on the Policy of the State in Relation to Her Colored Population . . .* (Richmond: White, 1832).

30. Jefferson Davis, *Address . . . before the Phi Sigma & Hermean Societies, of the University of Mississippi Oxford, July 15, 1852* (Memphis: Appeal Book and Job Office, 1852); James L. Pettigru, *An Oration Delivered before the Phi Kappa and Demosthenian Societies of the University of Georgia, August 6, 1846* (Athens: Southern Whig Office, 1846); R. M. T. Hunter, *An Address Delivered before the Society of Alumni of the University of Virginia: At Its Second Annual Meeting, Held in the Rotunda, on the 4th of July, 1839* (Charlottesville: Tompkins and Noel, 1839).

31. John Pendleton Kennedy, *Swallow Barn, Or a Sojourn in the Old Dominion* (Philadelphia: Carey & Lea, 1832); Joseph Glover Baldwin, *The Flush Times of Alabama and Mississippi* (New York: D. Appleton and Company, 1853).

32. Caroline Hentz, *The Planter's Northern Bride* (Philadelphia: Peterson, 1854); Edward Josiah Stearns, *Notes on Uncle Tom's Cabin: Being a Logical Answer to Its Allegations and Inferences against Slavery as an Institution* (Philadelphia: Lippincott, Grambo, 1853); Mary H. Eastman, *Aunt Phillis' Cabin; or, Southern Life as It Is* (Philadelphia: Lippincott, Grambo, 1852); Maria J. McIntosh, *The Lofty and the Lowly; or, Good in All, and None All-Good* (New York: Appleton, 1853).

33. See Alfred L. Brophy, "The Republics of Liberty and Letters: Progress, Union, and Constitutionalism in Graduation Addresses at the Antebellum University of North Carolina," *North Carolina Law Review* 89, no. 6 (2011): 1879–1964.

34. Thomas R. Dew, *Review of the Debate in the Virginia Legislature in 1831 and 1832* (Richmond: White, 1832); Nathaniel Beverley Tucker, *George Balcombe* (New York: Harper, 1836); Nathaniel Beverley Tucker, "A Note to Blackstone's Commentaries," *Southern Literary Messenger* 1, no. 5 (1835): 227–31; Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States* (Philadelphia: Johnson, 1858); George Sawyer, *Southern Institutes* (Philadelphia: Lippincott, 1858); Albert Taylor Bledsoe, *An Essay on Liberty and Slavery* (Philadelphia: Lippincott, 1856); Henry St. George Tucker, *A Few Lectures on Natural Law* (Charlottesville, Va.: Alexander, 1844); George Frederick

Holmes, "Observations on a Passage in the Politics of Aristotle on Slavery," *Southern Literary Messenger* 16, no. 4 (1850): 193–205; James P. Holcombe, "Is Slavery Consistent with Natural Law?" *Southern Literary Messenger* 27, no. 6 (1858): 401–21.

35. Cf. Eugene Genovese and Elizabeth Fox-Genovese, *The Mind of the Master Class: History and Faith in the Southern Slaveholders' Worldview* (Cambridge: Cambridge University Press, 2005), 3, with John Majewski, *Modernizing a Slave Economy: The Economic Vision of the Confederate Nation* (Chapel Hill: University of North Carolina Press, 2009).

36. *Heathcock v. Pennington*.

37. *State v. Mann*, 13 N.C. 263 (1830).

38. See, e.g., *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 375 (1856) (Campbell, J.); *Dyer v. Tuscaloosa Bridge Company*, 2 Porter 296 (Ala., 1835) (narrowly construing a legislative grant to operate a bridge and thus permitting competing bridges).

39. *Lexington & Ohio Railroad v. Applegate*, 38 Ky. (8 Dana) 289 *15 (1839) ("The onward spirit of the age must, to a reasonable extent, have its way. The law is made for the times and will be made or modified by them. The expanded and still expanding genius of the common law should adapt it here, as elsewhere, to the improved and improving condition of our country and our countrymen. And therefore, rail roads and locomotive steam cars—the offspring, as they will also be the parents, of progressive improvement—should not, in themselves, be considered as nuisances, although, in ages that are gone, they might have been so held, because they would have been comparatively useless, and therefore more mischievous.") Justice Robertson's reasoning and language then spread northward. See, e.g., *Chapman v. Albany & S.R. Co.*, 10 Barb. 360 (N.Y. Supp. 1851) (quoting *Applegate*); *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49 (1852) (citing *Applegate* and limiting a railroad's liability for consequential damages to land not taken). Justice Levi Woodbury, a Democrat from New Hampshire, cited Robertson to support the proposition that private charters might be altered in *West River Bridge v. Dix*, 47 U.S. 507, 547 (1848). Otherwise, Woodbury concluded, "The means of social and commercial intercourse might be petrified, and remain for ages, like the fossil remains in sandstone, unaltered, and the government, the organ of a progressive community, be paralyzed in every important public improvement."

40. *Shorter v. Smith*, 9 Ga. 517, 525, 527 (1851).

41. See Michael J. O'Brien, "Conservative Thought in the Old South: A Review Article," *Comparative Studies in Society and History* 34, no. 3 (1992): 566, 569–70 (discussing importance of context).

42. See, e.g., Thomas Roderick Dew, *A Digest of the Laws, Customs, Manners, and Institutions of the Ancient and Modern Nations* (New York: Appleton, 1853).

43. See, e.g., Hugh S. Legaré, "Kent's *Commentaries*," *Southern Review* 2 (1829): 72, 78. In *Hull v. Hull*, 3 Rich. Eq. 65 (1850), for example, South Carolina's chancery court wrote of the changes in treatment of personal property (like trusts), from the era when personal property was of less importance than real property to a period when it was of greater importance: "The feudal system yielded to the irresistible influence of advancing civilization; but it yielded slowly, and its stern features are still, and for a long period to come will remain, deeply impressed upon the civil polity of the British Isles. And even here in this new and distant land, and under our republican institutions, differing so widely from those of mediaeval ages, it not unfrequently imposes its rude shackles upon the administration of justice."

44. Cobb, *Inquiry*, 179–85.

45. James Henley Thornwell, *The State of the Country* (Columbia, S.C.: Southern Guardian, 1861), 14.

46. Ibid.

47. Ibid., 25.

48. John Randolph Tucker, *Address . . . Delivered before the Phoenix and Philomathean Societies, of William and Mary College, on the 3d of July, 1854* (Richmond: Wynn, 1854), 11.

49. Ibid., 15.

50. *Leary v. Durham*, 4 Ga. 593, 602 (1848).

51. In speaking of the scholar (though one might think of him as speaking of the jurist as well), Emerson said that "whatsoever new verdict Reason from her inviolable seat pronounces on the passing men and events of to-day,—this he shall hear and promulgate." See Ralph Waldo Emerson, "American Scholar," in *Emerson's Essays*, ed. Joel Porte (New York: Library of America, 1983), 51, 64.

52. *State v. Ephraim*, 19 N.C. 160, 167 (1836).

53. Perhaps the best-known example of the alliance between legal doctrine and political ideology in the antebellum South involves the changes in Kentucky courts' composition in the 1820s and the resulting changes in bankruptcy and Contracts Clause doctrine. See Theodore W. Ruger, "'A Question Which Convulses a Nation': The Early Republic's Greatest Debate About the Judicial Review Power," *Harvard Law Review* 117, no. 3 (2004): 827–97.

54. Robert Cover, *Justice Accused: Anti-Slavery and the Judicial Process* (New Haven: Yale University Press, 1975).

55. Herman Melville, *Billy Budd, Sailor: An Inside Narrative* (1924; Indianapolis: Bobbs-Merrill, 1975); Harriet Beecher Stowe, *Dred: A Tale of the Great Dismal Swamp* (Boston: Phillips, Sampson, 1856).

56. Cobb, *Inquiry*, 174.

57. *Fisher's Negroes v. Dabbs*, 14 Tenn. 119 *6 (1834).

58. *Hinds v. Brazealle*.

59. See William Goodell, *The American Slave Code in Theory and Practice* (New York: American and Foreign Anti-Slavery Society, 1853) (discussing state restrictions on literacy). Gates thinks somewhat differently; he sees restrictions on literacy as an effort to force slaves to conform to prevailing beliefs in biological inferiority. See Henry Louis Gates, "Race, Writing, and Difference," *Mississippi College Law Review* 3, no. 2 (1984): 287–97.

60. *State v. Foreman*, 16 Tenn. 256 (1835).

61. Ibid., *12 (July Term). Catron separated law from morality, a common response of judges confronting property claims in the antebellum era.

62. *Caldwell v. State*, 1 Stew. & P. 327 (Ala. 1832) (construing jurisdiction to try white man for murder of Creek Indian).

63. Ibid., 332–33 (citing *Johnson v. McIntosh*, 23 U.S. 543 [1823]; *Goodall v. Jackson*, 29 Johns. R. 693 [N.Y. 1823]).

64. Ibid., 333.

65. Ibid., 339.

66. Ibid., 444.

67. Ibid., 445.

68. See Alfred L. Brophy, "Thomas Ruffin: Of Monuments and Moral Philosophy," *North Carolina Law Review* 87, no. 3 (2009): 799, 818–28.

69. Cf. *Atwood's Heirs v. Beck*, 21 Ala. 590 (1852) and *Trotter v. Blocker*, 6 Porter 269 (1838) with *Blackmore and Hadley v. Phil*, 15 Tenn. (7 Yerger) 452 (1836).

70. *American Colonization Society v. Gartrell*, 23 Ga. 448, *11 (1857).

71. *Cleland v. Waters*, 16 Ga. 496 (1854).

72. *Vicksburg and Jackson Railroad Company v. Patton*, 31 Miss. 156 *3 (1856). Arguments of counsel for the railroad also show evidence of romantic rhetoric. Counsel spoke of the value of railroads and telegraph to society: "The requirements of the age, the spirit of public improvement, the law of progress, so strikingly exhibited by all the civilized nations of the earth, imperiously demand a medium for the more rapid transportation of person, property and intelligence. Science was taxed—was in *travail* to discover it. The present century originated it. The law throws its protecting arms around the *iron horse* and the winged messenger of lightning, to prevent obstructions in their rapid flight."

73. See *Burroughs v. Peyton*, 57 Va. 470 (1864); *Daly v. Fitzgerald*, 34 Ga. Supp. 85 (1864); *Ex Parte Tate*, 39 Ala. 254 (1864); *Gatlin v. Walton*, 60 N.C. 222 (1864); *Ex Parte Mayer*, 27 Tex. 715 (1864); Alfred L. Brophy, "'Necessity Knows No Law': Vested Rights and the Styles of Reasoning in the Confederate Conscription Cases," *Mississippi Law Journal* 69, no. 3 (2000): 1123–80.

74. One classic example of this is the reaction to Thomas Ruffin's 1830 opinion in *State v. Mann*, to which subsequent courts as well as abolitionists responded down into the 1850s. See, e.g., *State v. Negro Will*, 18 N.C. (1 Dev. & Bat.) 121, 126 (December Term 1834); *State v. Caesar*, 31 N.C. (9 Ired.) 391 (June Term 1849); *State v. Hoover*, 20 N.C. (3 & 4 Dev. & Bat.) 500 (December Term 1839); *Neal v. Farmer*, 9 Ga. 555 (May Term 1851); Cobb, *Inquiry*, 84 (citing *State v. Mann*); Harriet Beecher Stowe, *A Key to Uncle Tom's Cabin* (Boston: Jewett, 1853), 70–72, 77–79, 81–86, 108, 121, 233 (discussing Ruffin and *State v. Mann*).

75. See, e.g., Daniel Lord, *On the Extra-Professional Influence of Lawyers and Ministers* (New York: Chatterton, 1851), 3; Timothy Walker, *The Reform Spirit of the Day: An Oration before the Phi Beta Kappa Society of Harvard University, July 15, 1850* (Boston: Munroe, 1850), 15.

76. *Williamson v. Williamson*, 57 Ky. (18 B. Mon.) 329 (1858).

77. *Neal v. Farmer*. One Georgia justice evaluated a testator's mental state at various stages of his life through imagery of light. See *Terry v. Buffington*, 11 Ga. 337 (1852) ("These and like objects, although seen by the testator as through a glass dimly, by reason of the infirmity of age, or other causes, are still contemplated, not by the flashy, fitful and evanescent glare of the aurora borealis; but the steady, though subdued light and illumination of the 'glorious king of day,' although disrobed of his gorgeous and dazzling beams.")

78. See *Newsom v. Jackson*, 26 Ga. 241 (1858).

79. Anthony Grafton, *Worlds Made by Words: Scholarship and Community in the Modern West* (Cambridge: Harvard University Press, 2009).

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Peaceful Revolution and Popular Sovereignty

Reassessing the Constitutionality of Southern Secession

Roman J. Hoyos

Plainly, the central idea of secession, is the essence of anarchy.
—Abraham Lincoln, First Inaugural Address, 1861

THE DEBATE OVER THE CONSTITUTIONALITY of southern secession has long been a question of political morality. To say that secession was or was not constitutional is to say that the Civil War was or was not justified. Thus, two poles have come to define the interpretation of secession's constitutionality. Beginning shortly after the war in works by, among others, Albert Taylor Bledsoe, Alexander Stephens, and Jefferson Davis, former secessionists denied that slavery was the cause of the war, admitting only that it was the circumstance for separation. In this view, secession was simply a way to protect states' constitutional rights, the most important of which, of course, was the right to hold slaves.[1] For decades after the Civil War, writers in the Lost Cause tradition "endlessly asserted that secession was a constitutional right" and even "a sacred act." To their mind, the Civil War was an unjustified "War of Northern Aggression."[2] These writers have generally denied that slavery was the cause of the war. Although largely discredited now, primarily for the disingenuous way in which it ignores, denies, or diminishes the role of slavery, the argument can still be found in some polemical writings by modern libertarians.

Those who write in the unionist tradition, by contrast, reject secession's constitutionality, characterizing secession as an unjustified rebellion and its leaders as rebels and traitors. The starting point in this interpretation is usually Abraham Lincoln's First Inaugural Address, where he defined secession as "anarchy." Lincoln argued that the Union predated the states and that

the goal of the U.S. Constitution to "form a more perfect union" made the Union indestructible. This view has long reigned as the "correct" interpretation of secession's constitutionality. To concede secession's constitutionality risks rendering the U.S. Constitution a charter of slavery; by making secession unconstitutional, the federal Constitution can be vindicated as a charter of liberty.[3]

At least two problems inhibit our ability to transcend these interpretations. One is that the right of secession is not specifically identified in any constitution prior to 1860.[4] Thus, there is no clear textual basis for any resolution to the issue, which always presents a challenge for constitutional historians and theorists. The second problem is that the question of secession's constitutionality has been bound up in studies of the Civil War and its origins. This has led both to an overemphasis on the federal Constitution and to a failure to understand secession within the larger history of American constitutionalism.

Yet a couple of recent works have begun to clear out space for a new interpretation. In *Lincoln and the Triumph of the Nation*, Mark Neely compares the process of southern secession to the creation and ratification of the U.S. Constitution and finds that they were roughly equivalent as far as the popular nature of the process was concerned. He concludes that "the work of the secession conventions was compatible with the popular democracy of the antebellum South and the Confederate experience afterward."[5] Neely, however, does not devote a great deal of attention to the constitutional arguments for secession. Instead, he focuses more on the politics and processes of secession. Nevertheless, his book allows us to see the ways in which secession was a "popular" process, which is crucial to understanding secession's constitutionality. Stephanie McCurry's recent book also uncovers hitherto obscured popular dimensions of secession. As McCurry explains, "When Southerners made the decision for secession or for Union in 1860 and 1861, they did so in the name of the people."[6] It would be easy to mistake this invocation of "the people" as mere rhetoric, but McCurry takes it seriously to expose the political activity of women and African Americans in the Confederacy.

This popular turn in the study of secession is both healthy and justified by recent work in constitutional history and theory, which has uncovered not only a rich discourse of popular sovereignty but also an array of practices in which that discourse was rooted.[7] "The people" in nineteenth-century America were important political and constitutional actors. But, as McCurry

points out, the key issue was who were "the people"? For McCurry this is a question of "political membership." In other words, it was about who was or should be included in or excluded from the representation calculus.[8]

Who the people are is one of the central questions of American constitutional history. But who constitutes "the people" is not merely a descriptive question. As historian Edmund S. Morgan has pointed out, the concept "the people" is a "fiction."[9] Within any community or jurisdiction, some collection of the people less than the whole within that community is understood to constitute "the people," because it is impossible for the entire people to gather and make decisions. To put it another way, identifying a group or institution as "the people" is a claim to power.

The question of who the people are, then, also has an ascriptive element. As political theorist Jason Frank has explained, "the people" is a "never fully realized reference to the sovereign people beyond representation, beyond the law, the spirit beyond the letter, the Word beyond the words—the mystical foundations of authority." A paradox thus lies at the heart of the concept of popular sovereignty, as "the people are forever a people that is not . . . yet" Americans continue to invoke them and act as if "the people" do exist.[10] For an act to be of the people, the group of people acting must be ascribed to be the people. Because they "are forever a people that is not . . . yet," the question about who the people are is also a question of institutional competence and authority. "The people" cannot speak for themselves; they require institutions or other bodies to speak and act for them. Today, we commonly think of the electorate or "public opinion" as the people. But the people can take a variety of forms. The particular forms they take are time bound and thus subject to historical investigation.[11]

This dimension of the people—the "who" authorized to speak in their name—came to define one of the central constitutional problems of secession for Americans in the Civil War era, and it centered on the constitutional convention. Although contested throughout the nineteenth century, by 1860 the constitutional convention had come to be understood as the institutional embodiment of the people. It was the chief device by which Americans revised their constitutions, and the process of revision came to be referred to as "peaceful revolution." The question that secessionists pressed during the secession winter was whether there were any limits to what a convention, as the institutional embodiment of the people, could do. Secessionists were not the first to raise the question, but they pressed its limits further than Americans before or since. Recovering secession's constitutionality, then, helps us

to uncover an important moment of change in the history of popular sovereignty. The mode of secession—constitutional conventions—challenged prevailing ideas about who the people were and how they could or should act. Secession and the Civil War that followed ultimately would transform American conceptions and practices of democracy and popular sovereignty.

Unionism Past and Present

To say that secession was constitutional runs counter to modern understandings.[12] Constitutional theorist Daniel Farber has summed up the modern consensus succinctly, concluding that "secession was indeed unconstitutional." "Neither the text nor the ratification debates," he writes, "provide any foothold for an exit option. On the contrary, such evidence as exists seems to lean in the other direction."[13] Similarly, a leading textbook on American constitutional history argues that secession "lacked constitutional legitimacy." Harold Hyman and William Wiecek agree that "disunion itself lacked constitutional justification."[14] And the U.S. Supreme Court argued in 1868 that "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."[15] The basis for this assessment has focused, quite understandably, on the text and history of the federal Constitution. According to this view, the only possible basis for secession's legitimacy lay in the natural right of revolution, not in any explicit constitutional authorization.

President Lincoln's First Inaugural Address has long served as the basis for the modern view. The themes that he developed in his pithy address, in fact, have come to characterize modern American constitutionalism more generally. But at least two other works laid out the argument in more detail. One was German American jurist Francis Lieber's pamphlet, *What Is Our Constitution?*, which explored a specific question concerning the nature of the union created by the federal Constitution. Lieber had lived in South Carolina for twenty years prior to resuming his residency in the North at the war's outset, giving him a distinctive perspective on the problem.[16] Another pamphlet, written by Joel Parker, was the narrowest in vision and the most painstaking in detail.[17] At the time, Parker was a law professor at Harvard Law School, where he trained a generation of jurists in constitutional law. He had also been a Massachusetts Supreme Court Justice, where he authored several important opinions. His highly legalistic pamphlet filled in the legal-constitutional details lacking in both Lincoln's address and Lieber's

pamphlet. All three texts sounded the same major themes that have come to dominate our understanding of secession's constitutionality.[18]

For unionists, secession could be justified only as an exercise of the natural right of revolution. This meant that secession's legitimacy turned on whether a clearly defined right had been violated.[19] Parker in particular ridiculed the idea that any rights of secessionists had been denied. He even went a step further, arguing that secession (as the right of revolution) was not even an automatic response to an infringement of a constitutional right. "The *right* of revolution," he contended, "does not exist in all cases where the *power* of revolution is found."[20] The problem for the southern states, as Parker saw it, was twofold. First was the absence of true grievances. For example, several states had seceded before the new Republican administration had taken office. The mere election of a president, achieved through constitutional means and without any other act, could hardly be said to infringe a constitutional right.

The second, deeper problem was that the right of revolution was a "personal" rather than a state right. Parker was not entirely clear about who exactly possessed this right—he seemed at some times to refer to individuals and at other times to "the people"—or how the right of revolution could be exercised as a "personal" right. But whoever possessed it, it was definitely not a state. As a natural right, the right of revolution was exercised against government, not by it. The people, therefore, were incapable of undertaking revolution by acting through their state governments; popular sovereignty and state sovereignty were distinct.

Taken to its extreme, Parker's argument seemed to suggest that the people of a state must endure any and all violations of its rights and integrity. Here, Lieber agreed. For Lieber, the nation was of paramount concern. He believed that no nation could provide for its self-destruction.[21] Lincoln could not have agreed more, though he put it more cautiously than either Lieber or Parker, holding "that no government proper ever had a provision in its organic law for its own termination."[22] The Union was perpetual and indestructible. Without sufficient reasons and with no institution by which to exercise the right of revolution, secession was simply rebellion. Recognizing a constitutional right to secession thus constituted "anarchy."[23]

Yet most secessionists did not rest their claims on the natural right of revolution. They claimed that secession was a *constitutional* right. To rebut this argument, unionists turned to an examination of the history and text

of the federal Constitution. Their counterargument rested on three main pillars: the perpetuity of the Union contained in the Framers' aim "to form a more perfect union," the Constitution's organicism contained in "We the people of the United States," and the Supremacy Clause of the federal Constitution. Together, these pillars demonstrated that the states were merely convenient subdivisions of government and that the federal Constitution did not authorize or reserve secession as a constitutional right. Parker put this idea in no uncertain terms: "These grants of rights [to the federal government] to occupy, take, possess, use, tax, try, judge, reverse, and do final execution within the limits of every State, show a permanent servitude of a most extensive character; the United States, representing all the States, being the *dominant*, and each State a *servient* party. From their very nature these rights and powers cannot be resumed or revoked at the pleasure of any State, or of any number of States less than the whole."[24] Parker's construction of the federal government as "dominant" and the states as "servient" would not sit well with secessionists.

For unionists, the Constitution's claim "to form a more perfect union" had to be interpreted to mean a "more perpetual union." They pointed out that the federal Constitution was intended to strengthen the Union as it had existed under the Articles of Confederation. And as the Articles had declared as its object "a perpetual union," the new constitution should be read as perfecting that objective. As Lincoln explained, to admit a constitutional right of secession would be a breach of the most fundamental policy underlying American constitutionalism, for "if destruction of the Union by one or more of the States be lawfully possible, the Union would be *less* perfect than before the Constitution, having lost the vital element of perpetuity." Even if the federal Constitution was understood as a contract or compact, as secessionists argued, the dissolution of the Union "would require all [ratifying states] to lawfully rescind it."[25] To strengthen this claim, unionists argued that the idea of perpetual union predated the Articles. According to Parker, for example, while the colonies had been separate from one another before independence, they nonetheless remained under a single jurisdiction, the British Empire, until they achieved independence. The federal government merely succeeded to that authority.[26] Moreover, independence was achieved only through union, with the Articles of Confederation created to ensure the survival of that union. The Constitution of 1787 was merely the penultimate step in the creation of a perpetual, indestructible union.[27]

In creating a national people rather than a collection of state peoples, united under a supreme constitution, unionists past and present have presented a powerful case against the lawfulness of secession. Indeed, cries of disunion had always elicited responses that violence would ensue if any state made good on the threat.[28] By 1860, the assumption that violence would ensue helped to make secession illegal or unconstitutional by definition, and the suppression of secession seem both natural and constitutional. As Lincoln had pointed out, if no government had provided for its own destruction by law, any attempt to do so would have to be violent and unlawful.[29] Thus, as Parker pointed out, once the error of secession as a constitutional right was exposed, all that remained was the right of revolution. And until that revolution was successful, secessionists were mere rebels.

The problem, though, was that there was historical precedent for a constitutional secession—the ratification of the federal Constitution. Ratification occupies an awkward place in the unionist argument, as it fits problematically with the belief that the Union is older than the states. For unionists, the states had never existed as individual sovereign states. Thus, nothing fundamentally changed with ratification. The 1787 Constitution merely strengthened an existing union. Ratification by state conventions was thus merely a convenient procedural device to gather the views of the people of the nation. This argument has been largely persuasive to modern scholars because it is so thoroughly modern. But it is a conception of constitutionalism that grew to prominence only after the Civil War. To apply this conception of constitutionality to antebellum America distorts our understanding of secession and obscures a profound transformation that secession helped to produce.

A different conception of constitutionality in the nineteenth century focused on the people and their power. And the most important device in the nineteenth century for exercising the people's sovereign power was the constitutional convention. None of the arguments against secession's constitutionality, past or present, have seriously accounted for this institution. Unionists have noted it only to dismiss its significance. Lincoln, for example, simply held that "*resolves* and *ordinances* [of conventions declaring secession] are legally void." Similarly, Parker asked rhetorically, "How can a State law (or ordinance, which is but another name for a law) relieve them from their obligation?"[30] This was simply a corollary of the argument that the federal Constitution created a perpetual union. If perpetual, then no single state had a right of exit. The secession ordinances were thus "utterly

without operation in law."[31] To the extent to which they have been noted, it has been for the purpose of summary dismissal of one of America's greatest constitutional innovations rather than sustained analysis.[32]

Peaceful Revolution

The idea that the people acting through a constitutional convention could remake the political order, or peaceful revolution, was not a secessionist invention in 1860. Nor did it originate with John Calhoun.[33] In fact, it was one of the central doctrines animating nineteenth-century American constitutionalism. To summarily dismiss the people's power, in convention assembled, erases a rich history of constitutional change. All of the states in the Union had used the convention to reform their state constitutions at least once before the war; some held several. In the midst of the War of 1812, a constitutional convention had brought the New England states to the verge of disunion.[34] And perhaps most famously (or infamously), South Carolina had relied on the convention in its attempt to nullify federal tariff laws in the early 1830s.[35] The states that seceded relied extensively on the peaceful revolution doctrine in making their arguments for the constitutionality of secession. While generally overlooked by constitutional historians, secessionists' use of the convention as the device by which to separate from the Union was deliberate. Even South Carolina, widely understood as the least democratic state of the period, clung to the idea "that sovereignty, illimitable and indivisible in nature, was an attribute of the people of the state who acted in their sovereign capacity through a convention chosen for this purpose[, and that t]his convention was the sovereign people in action."[36] It would be very easy to dismiss such claims as mere rhetoric. But to do so misses an important history and moment of constitutional change.

Conventions were not merely convenient. They were relied on precisely because they were understood to embody the people themselves. This was how the federal Constitution could be understood as "We the People." If the people of the state could agree, in convention assembled, to enter a union, perhaps they could also use this device to remove themselves. George Mason made this point in 1787 at the federal convention, and some historians have read Mason's remarks as a blueprint for secession.[37] According to Kenneth M. Stampp, for example, "delegates to the Philadelphia convention, in effect, explained both what proved to be the principal justification for secession (violations of the compact) and the method by which it might be accom-

plished (through a state convention)."[38] This logic was not lost on secessionists in 1860 when they invoked ratification of the federal Constitution as well as the subsequent history of state constitutional reform. According to Jefferson Davis, "The present Union owes its very existence to the dissolution, by separate secession of its members, of the former Union [the Articles government], which, as we have thus seen, as to its organic principles, rested upon precisely the same foundation. The right to withdraw from the association results, in either case, from the same principles—principles which, I think, have been established on an impregnable basis of history, reason, law, and precedent."[39] Alexander Stephens made the same point:

> The absolute right of local Self Government, or State Sovereignty, was the primal and leading idea throughout [ratification]. We have seen that these States, as Sovereign, responded to a call of a General Federal Convention, to revise the first Articles of Confederation. The present Constitution was the result of their labors. We have seen that it was submitted to the Legislatures of each State, in their separate State organization, to be referred by them to a Convention, in each State, of the people thereof, that they, in their Sovereign majesty, might approve or reject each, separately, for themselves, as States, and that it was to be established between such States only as should ratify it, and then only in case as many as nine should ratify it.[40]

The adoption of a new constitution in the 1780s linked secession, peaceful revolution, and popular sovereignty and served as an archetype for secessionists in 1860.

The question of secession's constitutionality, then, was not heavily dependent on the text of the federal Constitution. "It is absurd to talk of this right to secede not being conferred by the Constitution," wrote South Carolina's William Porter. "The Constitution can confer no right upon the states."[41] Similarly, fellow South Carolina lawyer and poet (and Unionist during the Nullification Crisis) William Grayson argued that, "to say [that secession] is not in the Constitution, is to say that it has not been granted away; it therefore remains."[42] Georgia's U.S. senator, Robert Toombs, agreed, declaring flatly that "the Constitution is not the place to look for State rights. If that right belongs to independent States, and they did not cede to it the Federal Government, it is reserved to the States, or to the people."[43]

Secessionists did not totally ignore the federal Constitution as an authority, however. Many argued that the constitutional right could be found, at least by inference, in the Ninth and Tenth Amendments. California's U.S. senator

Charles Scott offered one of the fullest discussions of this argument in 1861. According to Scott, the Ninth and Tenth Amendments embodied the belief of "the most enlightened statesmen of that day, that some further provisions were necessary in relation to particular subjects, and more especially; that such restrictive amendments should be made, as would effectually limit the General Government strictly within the exercise of its specified power."[44] Thus, the federal Bill of Rights had to be understood in light of the preamble that introduced the proposed amendments in Congress, which "clearly indicates the popular sentiment which prevailed after the formation of the first set of articles of the Constitution." According to this preamble, "The conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the government, will best insure the beneficent end of its institution."[45] The federal Bill of Rights thus emphasized that the federal government was to be limited in its aims and jurisdiction. The most important limit on federal power was the people. This was most evident, Scott argued, in the Ninth and Tenth Amendments, which "are more comprehensive and exclusively precise in their character. They cover every possible thing which the first set of articles contain, and guard against everything which they do not contain."[46]

The federal Bill of Rights, Scott was suggesting, was not rights-*granting* but rights-*protecting*. That was the reason for the open-ended nature of the Ninth and Tenth Amendments, which also had to be read together. The Ninth was "a fit introduction to stand in juxtaposition, and to come in aid, as it does," of the Tenth. On the one hand, the Ninth reserved every right and power not prohibited to the states, "as if it had been declared by name," while the Tenth prevented the federal government from exercising anything other than delegated power.[47] The federal Bill of Rights was thus a signpost pointing to places where rights could be found. While this has led many modern scholars to turn to an unwritten constitution, in the nineteenth century, Americans typically turned to their own state bills and declarations of rights.

Interestingly, Scott was using a logic that Akhil Amar has argued lies at the heart of what he calls the "popular-sovereignty amendments" to the federal Constitution. According to Amar, the U.S. Constitution's preamble and the Ninth and Tenth Amendments "are at their core about popular sovereignty." And "the most obvious and inalienable right underlying" these amendments was "the collective right of We the People to alter or abol-

ish government, through the distinctly American device of the constitutional convention."[48] This right was crucial to ensure that the federal government remained a limited one. "How are these government agents to be kept within these limits?" Amar asks.

> In part by mutual jealousy and monitoring, as we have seen throughout. State legislatures [and constitutional conventions] could alert the people to any perceived usurpations by central agents (consider the "sirens" sounded by the Virginia and Kentucky legislatures in 1798, or the Hartford convention in 1814–15); state militias could thwart and thus deter a tyrannical standing army; state common law of trespass could vindicate persons' Fourth Amendment rights and Fifth Amendment takings-clause rights; and so on.[49]

Despite the fact that Amar understands "the people" as the national people, his analysis seems to point to a concept of "the people" in more localized forms.[50] Many nineteenth-century Americans, not just secessionists, drew the same conclusion.[51]

The question for secessionists was not whether the federal Constitution authorized secession; they rejected the idea that the federal Constitution granted any rights. That constitution was simply a grant of authority to the federal government, not a charter of rights.[52] Rights were to be found elsewhere, primarily in the Declaration of Independence and state bills and declarations of rights. The most important right in those documents was the right to alter or abolish government, which by 1860 had come to be linked directly to the constitutional convention.[53] The right to alter or abolish government exercised through the constitutional convention was, as Scott described it, "the right of revolution, as a peaceful remedy, or if you do not wish to call it that, you can call it any other name you please, either the right of secession, or a right to re-assume the powers of independent State sovereignty."[54] In place of textual authorization, secessionists rested their arguments on institutional action. The connection between the right to alter or abolish government and the constitutional convention was the basis of what had become known as the "peaceful revolution doctrine" and had transformed, well before 1860, the right to alter or abolish government from a natural right of revolution to a constitutional right.[55] This conception of popular sovereignty was not peculiar to the South. It drew on the history of constitutional change that characterized nineteenth-century constitutionalism throughout the nation.

The origins of the peaceful revolution doctrine have been traced back to the Glorious Revolution.[56] But the idea was rediscovered and perfected as part of the American constitutional experience in the late eighteenth century.[57] The right to alter or abolish government was first articulated in the Declaration of Independence. In 1776, though, it was a translation of the natural right of revolution, in which the people could revolt only in the face of an oppressive government, which is one of the reasons Jefferson listed the grievances that preceded the actual declaration of independence found in the Declaration itself.[58] But after the constitution-making process of the 1780s, the right to alter or abolish government became unmoored from its natural rights origins and increasingly became understood as a positive right of the people. This right was quickly incorporated into many state bills and declarations of rights, initiating a transformation that would soon constitutionalize it. As Amar has explained, "Individual states echoed the Declaration of 1776 and extended it, giving the people's right to alter or abolish a precise, regular, peaceful, and legal form that it lacked before 1776."[59] In essence, the right was transformed into a power of the people to alter or abolish their government at will rather than for cause.[60]

The transformation of the right to alter or abolish government began as the states assembled constitutional conventions to create their first constitutions and then to reform them. It reached its culmination with the federal constitutional convention and the ratification process, as the federal convention directed state conventions rather than state legislatures to ratify the new constitution. The delegates to the federal convention adopted this procedure precisely because they understood conventions to embody the people in ways legislatures could not.[61] This procedure also helped to cure the federal convention's defective legality, as it was called to reform the Articles of Confederation, not to introduce a whole new constitution.[62] Ratification by the people of the states in convention assembled ultimately gave sanction to the idea that the federal Constitution represented the will of "We, the people."[63] Pennsylvania's 1790 convention, which reformed that state's 1776 constitution, was the coup de grâce, confirming as it did Americans' ability to change their forms of government without violence.

James Wilson grasped the significance of this achievement more quickly and fully than anyone else and was the first to give it intellectual content. What the United States had achieved in 1789 (and Pennsylvania in 1790) convinced him that Americans had mastered revolution. Shortly after rati-

fication of both constitutions, Wilson specifically identified the "revolution principle" as the central idea behind American constitutionalism and popular sovereignty. It was the "one great principle, the *vital* principle I may well call it, which diffuses animation and vigour through all the others. The principle I mean is this, that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it important."[64] The right to alter or abolish government, in Wilson's formulation, was much more than a right. It was "the sovereign power residing in the people." As a power, Wilson explained, the revolution principle did not entail the violent destruction of state or society. It is not, he proclaimed, "a principle of discord, rancour, or war, it is a principle of melioration, contentment, and peace." Thus, as the "happy experience" of both the United States and the several states had demonstrated, the people could cast off one form of government for another without violence. What made the revolution principle peaceful was that it had an institutional manifestation—the constitutional convention.[65] Lieber would emphasize the importance of institutional self-government, and specifically, conventions, a few decades later. While he did not use the term *peaceful revolution*, he did see conventions as release valves for pent-up frustration with government.[66] The safety supplied by the convention as the embodiment of the people's right to alter or abolish government also meant that it was a right that could be exercised at will.

The natural right conception of the right to alter or abolish government did not completely die out, however. In fact, some secessionists relied on the older understanding to justify secession. "From the time that this people declared its independence of Great Britain," Louisiana's U.S. senator Judah Benjamin wrote, "the right of the people to self-government in its fullest and broadest extent has been a cardinal principle of American liberty. None deny it." Thus, "whenever a form of government becomes destructive of their interests or their safety," Benjamin continued, the people can exercise their right "to alter or abolish it, and to institute a new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."[67] Benjamin seemed to be suggesting that the right to alter or abolish government could be exercised only for cause rather than at will, as Wilson had suggested. South Carolina's secession convention seemed to make the same claim. In

its Declaration of the Immediate Causes of Secession, it proclaimed "the two great principles asserted by the Colonies, namely: the right of a State to govern itself; and the right of a people to abolish a Government when it becomes destructive of the ends for which it was instituted."[68] But the natural and constitutional conceptions of the right could blend seamlessly at times. When secessionists claimed secession as a constitutional right, they were referring to the peaceful revolution doctrine. The constitutional convention made revolution a peaceful, orderly, regulated change of government and distinguished the natural from the constitutional right. Thus, despite his initial natural law construction of the right to alter or abolish government, Benjamin also understood the new constitutional inflection, explaining that "the right of the people of one generation, in convention duly assembled, to alter the institutions bequeathed by their fathers is inherent, inalienable, not susceptible of restriction; that by the same power under which one Legislature can repeal the act of a former legislature, *so can one convention of the people duly assembled*; and that it is in strict and logical deduction from this fundamental principle of American liberty."[69]

Jefferson Davis also wandered into and out of both conceptions of the right to alter or abolish government. His most important statement on the issue during the secession winter was his inaugural address as president of the new Confederacy. The seceding states, he argued in that speech, "merely asserted a right which the Declaration of Independence of 1776 had defined to be inalienable." He added that this was a "right solemnly proclaimed at the birth of the States, and which has been affirmed and re-affirmed in the bills of rights of States subsequently admitted into the Union of 1789, [which] undeniably recognizes in the people the power to resume the authority delegated for the purposes of government."[70] The transformation of the right from revolutionary to constitutional was so smooth that Davis appears to have missed it. He seemed to suggest that the nature of the right remained unchanged from 1776 to 1860. However, he fully understood the newer constitutional meaning. The constitutional right was not concerned with the overthrow of an existing government. Under the constitutional conception of the right to alter or abolish government, the people merely exercised their sovereign power to resume and redelegate the powers they had granted to their government.[71]

Davis continued to develop this idea after the war in his apologia, arguing that whether exercised at will or "whenever [the constitution] ceased

to fulfill the purposes for which it was ordained and established," secession as the exercise of the people's sovereign right to alter or abolish government was "the assertion of the inalienable right of a people to change their government." Because this right was vested in the people, its exercise "has no revolutionary or insurrectionary characteristic. The government of the State remains unchanged as to all internal affairs. It is only its external or confederate relations that are altered. To term this action of a sovereign a 'rebellion,' is a gross abuse of language."[72] His postwar arguments, however, were entirely consistent with his arguments during the crisis itself, as well as with antebellum ideas and practices of constitutional change.

State Sovereignty as Popular Sovereignty

The constitutional convention is also key to understanding secessionist ideas of state sovereignty. Here again, ratification of the federal Constitution was the exemplar. Jefferson Davis explained that "it was State ratification alone—*the ratification of the people of each State*, independently of all other people—that gave force, vitality, and validity to the Constitution." Ratification established the "plain and primary truth" that "the States are the people." The convention linked state and popular sovereignty. "The people do not speak, never have spoken, and never can speak, in their sovereign capacity (without a subversion of our whole system), otherwise than as the people of the State."[73]

When secessionists referred to *state sovereignty*, then, they were not referring to state governments. *Sovereignty* referred to the people, and *state* referred to a particular people.[74] As sovereign, the people "only delegate to their governments the exercise of such of its functions as may be necessary, subject always to their own control, and to reassumption whenever such government fails to fulfill the purposes for which it was instituted."[75] Davis articulated a long-held idea in American political thought when he rejected the idea that a government could be sovereign.[76] Governments were simply institutions through which certain sovereign powers were exercised, while sovereignty itself remained with the people in convention assembled.

The orderliness and regularity provided by the constitutional convention gave the people's will and voice a singular clarity. The "will of the people" was thus "not a will expressed in any irregular, lawless, tumultuary manner, but the will of the organized political community, expressed through authorized and legitimate channels."[77] Secessionists were referring to this

process when they argued that as they had "acceded" to the Union, so could they secede from it. In 1860, before states began seceding, Texas U.S. senator Louis T. Wigfall described the process:

> The State governments will call conventions; *the people will be heard*; they will vote; and unless a large majority of *the people of each one of these States* are in favor of resuming the powers, they will not be resumed. When a large number of the people of any one of these States shall conclude that they will live more happily or more prosperously under another government, they will assert that right by reforming their constitution, and erecting another Government upon the ruins of the one which they have destroyed.[78]

With the constitutional convention, there was no return to a state of nature. Instead, sovereign powers would merely be resumed and redelegated by the sovereign people. This process served as the link between state and popular sovereignty, a connection that unionists, as we have seen, sought to break.

Occasionally, however, even secessionists needed to be reminded of the importance of the convention to both popular and state sovereignty. One of the most important incidents occurred in Georgia, where impatience almost got the better of some radical members of the state legislature, who introduced a resolution that would have allowed the legislature to pass a secession ordinance.[79] With Georgia rested the fate of the first wave of secession. South Carolina had already seceded, and Georgians were deeply divided on the issue. Georgia had failed to follow South Carolina's lead during the first secession crisis in the early 1850s. If Georgia could be convinced to follow South Carolina out of the Union in 1861, the remaining states of the Lower South would probably follow suit. The legislature's resolution thus sparked a furor that some historians have compared to the Lincoln-Douglas debates.[80]

Several of Georgia's most prominent politicians, including future Confederate vice president Alexander Stephens, gathered in Milledgeville (Georgia's capital at the time) to debate this resolution at nightly public meetings. The case for immediate legislative secession was pressed initially by T. R. R. Cobb and Robert Toombs, whose principal argument was that to delay would give the advantage to unionists.[81] Stephens responded first that reason and deliberation should guide the state's actions, and that reason and deliberation could only take place in a convention.[82] More important, he pointed out that "the Legislature is not the proper body to sever our federal relations." Ste-

phens here reminded his audience of the basic idea of popular sovereignty. "Sovereignty is not in the Legislature. We, the people, are sovereigns. . . . You legislators—I speak it respectfully—are but our servants." However "much derided lately," popular sovereignty remained "the foundation of our institutions[:] Our Constitution came from the people. They made, and they alone can rightfully unmake it." In short, only through a convention could "the sovereignty of the people speak." Thus, because secession involved changing Georgia's constitutional relation to the United States, the issue should be submitted to an "untrammelled convention." Once the convention decided, "the whole State shall present one unanimous voice in favor of whatever may be demanded." Stephens had nearly a century of constitutional change behind him. To reject this history and prevent the sovereign people from being heard, he concluded, suggested "that our institutions, founded upon the principles of self-government, are a failure."[83]

The power of Stephens's argument was its obviousness. He had simply reiterated the basic principles of American constitutionalism: that the people were sovereign and that the exercise of their ultimate sovereign power to alter or abolish government could be accomplished only through a convention. Once a convention decided, the people of the state were obliged to comply, as Stephens himself would, eventually becoming vice president of the Confederacy despite his trepidations about secession. This was what Stephens meant when he stated after the war that the "difference . . . between State Sovereignty and Popular Sovereignty I know not. By State Sovereignty I understand the Sovereignty of the People composing a State in an organized political Body."[84] This was not a new idea in 1860, much less in 1868, when Stephens wrote his postwar apologia for his participation in secession.

Secession's Challenge

The constitutional convention was thus the response to Lincoln's claim that "the central idea of secession is the essence of anarchy." The constitutional convention made secession peaceful, regulated, *constitutional*. This is not to say that there was no resistance to secession even within the states that seceded. Western Virginians would effect their own secession, and unionists and other resisters could be found in every state. Moreover, as the U.S. Supreme Court pointed out after the war, "The position thus assumed could only be maintained by arms."[85] But time and again, even Stephens and others who opposed secession acquiesced to what they considered to be the will of

the people. These ideas were rooted in the practices of constitution making and constitutional change that characterized the nineteenth century.

Long overlooked in studies of secession is the fact that the constitutional convention was central to both the arguments for secession and the mode in which the southern states seceded. This process made secession "popular," in the ascriptive sense, and constitutional. As the visible embodiment of the people, the convention made secession an exercise of the sovereign powers of the people. This was a deliberate choice.

But here lay the rub. If the war was fought at least in part to repudiate the idea once and for all that the people of a state could unilaterally secede from the Union, then new answers to the questions of who the people were and how they could act would have to be offered.[86] Southern secession had pushed the peaceful revolution doctrine beyond its limits. As Lincoln and others explained, revolution—peaceful or otherwise—would no longer have any place in American constitutionalism. An unlimited and active people simply proved too dangerous to be maintained. Secession did not pose the question "Who are the people?" just to the Confederacy. Americans in both the North and the South would grapple with the extent of and limits to popular sovereignty. What was at stake regarding the constitutionality of secession was not just the fate of the Union (as if that were not enough) but democracy, popular sovereignty, and liberty.

Chicago lawyer and judge John Alexander Jameson was one of the first to deal with these problems systematically after the war. His treatise on constitutional conventions, first published in 1867, detailed the transformation of popular sovereignty.[87] What once had been central to American notions of liberty and democracy was now viewed as a threat to it. The very idea of a people exercising their sovereign power to alter or abolish government through a constitutional convention Jameson now characterized as "a disorganizing maxim." Over the next few decades, Americans would sort through exactly what these new ideas of democracy and popular sovereignty would look like. One thing was clear, though: "the people" as an active constituent of the American polity would have to be tamed, or, as Jameson put it, "domesticated."[88]

NOTES

1. Albert Taylor Bledsoe, *Is Davis a Traitor; or, Was Secession a Constitutional Right Previous to the War of 1861?* (Baltimore: Innes, 1866); Alexander Hamilton Stephens, *A Constitutional View of the Late War between the States: Its Causes, Character, Conduct*

and Results (Chicago: National, 1868); Jefferson Davis, *The Rise and Fall of the Confederate Government*, 2 vols. (New York: Appleton, 1881).

2. Alan T. Nolan, "The Anatomy of a Myth," in *The Myth of the Lost Cause and Civil War History*, ed. Gary W. Gallagher and Alan T. Nolan (Bloomington: Indiana University Press, 2000), 18; David W. Blight, *Race and Reunion: The Civil War in American Memory* (Cambridge: Belknap Press of Harvard University Press, 2003), 257, more generally 255–99.

3. Some abolitionist critics made precisely this claim about the federal Constitution's relationship to slavery. Some modern works come to similar conclusions. See Philip Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (Urbana: University of Illinois Press, 1975); David Waldstreicher, *Slavery's Constitution: From Revolution to Ratification* (New York: Hill and Wang, 2009); Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government's Relations to Slavery* (New York: Oxford University Press, 2001); David F. Ericson, *Slavery in the American Republic: Developing the Federal Government, 1791–1861* (Lawrence: University Press of Kansas, 2011). On the problem of Whig constitutional history, see William J. Novak, "Constitutional Theology: The Revival of Whig History in American Public Law," *Michigan State Law Review* 2010 (Fall 2010): 623.

4. Maryland's 1850 constitutional convention made a failed attempt to include the right of secession in that state's constitution. For a discussion of the debate, see Roman J. Hoyos, "The Rise and Fall of Popular Sovereignty: Constitutional Conventions, Law, and Democracy in Nineteenth Century America" (PhD diss., University of Chicago, 2010), 119–38.

5. Mark Neely, *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War* (Chapel Hill: University of North Carolina Press, 2011), 265.

6. Stephanie McCurry, *Confederate Reckoning: Power and Politics in the Civil War South* (Cambridge: Harvard University Press, 2010), 34.

7. See, e.g., Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: Norton, 1988); Jason A. Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Durham: Duke University Press, 2010); Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition before the Civil War* (New York: Cambridge University Press, 2008); Akhil Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 2000); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

8. McCurry, *Confederate Reckoning*, 11–37.

9. Morgan, *Inventing the People*, 3.

10. Frank, *Constituent Moments*, 3, 5.

11. See generally, e.g., Fritz, *American Sovereigns*.

12. Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: Norton, 2005), 769–75; Daniel Farber, *Lincoln's Constitution* (Chicago: University of Chicago Press, 2003), 90; Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of the Civil War* (Lanham, Md.: Rowman and Littlefield, 2000); Alfred Kelly, Winfred Harbison, and Herman Belz, *The American Constitution: Its Origins and Development*, 7th ed. (New York: Norton, 1991), 1:282; James M. McPherson, *Battle Cry of Freedom* (New York: Oxford University Press, 1988), 234–75; Harold Hyman and William Wiecek, *Equal Justice under Law: Constitutional Development, 1835–1875* (New York: Harper and Row, 1986), 203–31; Michael P. Johnson, *Toward a Patriarchal Republic: The Secession of Georgia* (Baton Rouge: Louisiana State University Press, 1977), 28–

34; David M. Potter, *The Impending Crisis, 1848–1861* (New York: Harper and Row, 1976), 444–84; Paul C. Nagel, *One Nation Indivisible: The Union in American Thought, 1776–1861* (New York: Oxford University Press, 1964); Westel W. Willoughby, *The American Constitutional System: An Introduction to the Study of the American State* (New York: Century, 1904), 26 n. 1; John W. Burgess, *The Civil War and the Constitution, 1859–1865* (New York: Scribner, 1901), 74–137; Edward Payson Powell, *Nullification and Secession in the United States: A History of the Six Attempts during the First Century of the Republic* (New York: Putnam's, 1898), 411–41; Herman Belz, "Lincoln, Secession, and Revolution: The Civil War Challenge to the Founding," in *Challenges to the American Founding: Slavery, Historicism, and Progressivism in the Nineteenth Century*, ed. Ronald J. Pestritto and Thomas G. West (Lanham, Md.: Lexington Books, 2005), 81–114.

13. Farber, *Lincoln's Constitution*, 3.

14. Hyman and Wiecek, *Equal Justice*, 211.

15. *Texas v. White*, 74 U.S. 700, 725 (1868).

16. Francis Lieber, *What Is Our Constitution, League, Pact, or Government? Two Lectures on the Constitution of the United States Concluding a Course on the Modern State* (New York: Board of Trustees, 1861).

17. Joel Parker, *The Right of Secession: A Review of the Message of Jefferson Davis to the Congress of the Confederate States* (Cambridge, Mass.: Welch, Bigelow, 1861).

18. Paludan, *Covenant with Death*, 88, 127.

19. Herman Belz made a similar argument in "Abraham Lincoln and American Constitutionalism," *Review of Politics* 50, no. 2 (1988): 169, 174.

20. Parker, *Right of Secession*, 12.

21. Paludan, *Covenant with Death*, 61–84. This was the main theme of Lieber's pamphlet, *What Is Our Constitution?*

22. Abraham Lincoln, "First Inaugural Address—Final Text," in *The Collected Works of Abraham Lincoln*, ed. Roy Basler (New Brunswick, N.J.: Rutgers University Press, 1953–55), 4:264.

23. Lieber used this term, too (*What Is Our Constitution?*, 33).

24. Parker, *Right of Secession*, 34; see also Lieber, *What Is Our Constitution?*, 32–33.

25. Lincoln, "First Inaugural Address," 265.

26. Parker, *Right of Secession*, 22.

27. Ibid., 22–25; Lincoln, "First Inaugural Address," 265; Lieber, *What Is Our Constitution?*, 17–30.

28. Elizabeth R. Varon, *Disunion! The Coming of the American Civil War, 1789–1859* (Chapel Hill: University of North Carolina Press, 2008).

29. Lincoln, "First Inaugural Address," 264.

30. Parker, *Right of Secession*, 17.

31. *Texas v. White*, 725.

32. R. R. Palmer, *The Age of Democratic Revolution: A Political History of Europe and America, 1760–1800* (Princeton: Princeton University Press, 1959), 1:214.

33. Mark Neely has stated nicely the long-standing view that Calhoun is the source of this idea: "The theory of secession, derived in one way or another from the works of John C. Calhoun, dictated that special conventions, embodying a sovereignty above that of the mere legislatures . . . had to be summoned to express the true will of the people on such an important question" (*Lincoln and the Triumph of the Nation*, 264).

34. See, e.g., James M. Banner, *To the Hartford Convention: The Federalists and the Origins of Party Politics in Massachusetts, 1789–1815* (New York: Knopf, 1970).

35. See, e.g., Fritz, *American Sovereigns*. Fritz covers all of the major national events involving this idea of popular sovereignty.

36. Laura A. White, "The Fate of Calhoun's Sovereign Convention in South Carolina," *American Historical Review* 34, no. 4 (1929): 757, 762.

37. Kenneth M. Stampp, "The Concept of Perpetual Union," *Journal of American History* 65, no. 1 (1978): 5, 36.

38. Ibid., 14–15. See also Bruce Ackerman, *We the People: Foundations* (Cambridge: Belknap Press of Harvard University Press, 1991), 165–99.

39. Jefferson Davis, *Rise and Fall*, 1:119, 135, 149.

40. Stephens, *Constitutional View*, 295–96.

41. William D. Porter, *State Sovereignty and the Doctrine of Coercion*, 1860 Association, Tract 2 (n.p., n.d.), 32.

42. William J. Grayson, *Reply to Professor Hodge, on the "State of the Country"* (Charleston, S.C.: Evans and Cogswell, 1861).

43. *Congressional Globe*, 36th Cong., 2nd sess., 269 (1860).

44. Charles L. Scott, *Address of the Hon. Charles L. Scott, to His Constituents on the Constitutional Right of Secession* (Washington, D.C.: n.p., 1861), 5.

45. Ibid. (internal quotes omitted). The full text can be found in Jack N. Rakove, *Declaring Rights: A Brief History with Documents* (Boston: Bedford, 1998), 189.

46. Scott, *Address*, 6.

47. Ibid., 6–7.

48. Amar, *Bill of Rights*, 121, 120.

49. Ibid., 123.

50. Amar has never adequately accounted for why his concept of "the people" means the people of the United States as a whole.

51. See generally Fritz, *American Sovereigns*; Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

52. This distinction between a grant of power and a limit on power was and remains the chief distinction between state and federal constitutionalism. The idea that the federal Constitution was a grant of authority was one of the main arguments against including a bill of rights. The difference matters when a state constitution is silent on a particular power; the starting assumption is that the state legislature can act. By contrast, Congress must point to a specific grant of authority before it can act. That was the purpose of Article I, Section 8 of the federal Constitution. State constitutions, by contrast, do not enumerate legislative powers, only restrictions.

53. See, e.g., Fritz, *American Sovereigns*, 235–76; Akhil Amar, "The Consent of the Governed: Constitutional Amendment Outside Article V," *Columbia Law Review* 94, no. 2 (1994): 457.

54. Scott, *Address*, 6–7. See also J. L. M. Curry, *Legal Justification of the South* (Atlanta: Confederate, 1899), 19–22.

55. But see Jaffa, *New Birth of Freedom*. Jaffa's failure to account for the constitutional convention enables him to see only one transformation in the right to alter or abolish government. Increasingly after the election of 1800, he argues, the right was associated with majority rule through elections. Jefferson Davis explained that this right could be exercised either through elections or through conventions (*Rise and Fall*, 1:135).

56. See, e.g., James Wilson, *Lectures on Law*, reprinted in *The Works of James Wilson*, ed. Kermit Hall and Mark David Hall (Indianapolis: Liberty Fund, 2007), 442–43.

Steven Pincus has recently pointed out, however, that the Glorious Revolution was a good deal more violent than has been traditionally believed (*1688: The First Modern Revolution* [New Haven: Yale University Press, 2009]).

57. Morgan, *Inventing the People*, 237–306.

58. Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (1922; New York: Vintage, 1970), 24–79.

59. Amar, "Consent of the Governed," 464.

60. Wilson, *Lectures on Law*, 441.

61. On this process, see Gordon Wood, *The Creation of the American Republic, 1776–1787* (1969; Chapel Hill: University of North Carolina Press, 1998), 532–36; Fritz, *American Sovereigns*, 150–52. Wood sees this process as a reaction against legislatures, which drafted many of the first constitutions. Fritz disputes this interpretation, arguing that even though legislatures drafted the first constitutions, they only did so after special elections in which drafting a constitution was the main issue.

62. Constitutional theorists debate whether the federal convention was a legal institution. Compare Amar, "Consent of the Governed" (legal) with Bruce Ackerman and Neal Katyal, "Our Unconventional Founding," *University of Chicago Law Review* 62, no. 2 (1995): 475–573 (illegal); Richard S. Kay, "The Illegality of the Constitution," *Constitutional Commentary* 4, no. 1 (1987): 57–80.

63. Akhil Amar, *America's Constitution: A Biography* (New York: Random House, 2005), chapter 1.

64. Wilson, *Lectures on Law*, 440–41.

65. Ibid., 443. See also George M. Dennison, "The 'Revolution Principle': Ideology and Constitutionalism in the Thought of James Wilson," *Review of Politics* 39, no. 2 (1977): 174. Thomas Jefferson was coming to similar conclusions privately around the same time. See Laura Scalia, *America's Jeffersonian Experiment: Remaking State Constitutions, 1820–1850* (DeKalb: Northern Illinois University Press, 1999), 4–5. Jefferson's fullest elaboration of these ideas came in a well-known letter to Samuel Kerchival a couple of decades later. See Merrill D. Peterson, ed., *The Portable Jefferson* (New York: Penguin, 1975), 552–61.

66. Francis Lieber, *Manual of Political Ethics: Designed Chiefly for the Use of Colleges and Students at Law* (Boston, 1838–39), 2:468.

67. Judah P. Benjamin, *The Right of Secession (1860)*, in *Southern Pamphlets on Secession, November 1860–April 1861*, ed. Jon L. Wakelyn (Chapel Hill: University of North Carolina Press, 1996), 102 (quoting the Declaration of Independence).

68. "Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union," in *Journal of the Convention of the People of South Carolina, held in 1860–'61* (Charleston: Evans and Cogswell), 462.

69. Benjamin, *Right of Secession*, 103 (emphasis added).

70. "Jefferson Davis's Inaugural Address," Montgomery, Alabama, February 1861, http://www.civilwarhome.com/davisinauguraladdress.htm.

71. Davis, whether or not he knew it, seemed to be echoing James Wilson's characterization of government as a mere "scaffolding" that could be set up and taken down at will.

72. Jefferson Davis, *Rise and Fall*, 1:158.

73. Ibid., 132, 152.

74. Cf. Akhil Amar, "Of Sovereignty and Federalism," *Yale Law Journal* 96, no. 7 (1987): 1425.

75. Davis, *Rise and Fall*, 1:142.

76. Wood, *Creation of the American Republic*.

77. Jefferson Davis, *Rise and Fall*, 1:127, 128, 136, 128.

78. *Speech of Hon. L. T. Wigfall, of Texas* (Washington, D.C.: Towers, 1860), 4 (emphasis added).

79. See William W. Freehling and Craig M. Simpson, eds., *Secession Debated: Georgia's Showdown in 1860* (New York: Oxford University Press, 1992), vii–xxi.

80. Ibid., vii.

81. Ibid., chapters 1–2. Toombs and Stephens were longtime friends. See William C. Davis, *The Union That Shaped the Confederacy: Robert Toombs and Alexander Stephens* (Lawrence: University Press of Kansas, 2001).

82. "Alexander H. Stephens's Unionist Speech, Wednesday Evening, November 14," in Freehling and Simpson, *Secession Debated*, 51–79, 56.

83. Ibid., 72–73.

84. Stephens, *Constitutional View*, 8.

85. *Texas v. White*, 724.

86. McPherson, *Battle Cry of Freedom*.

87. John Alexander Jameson, *The Constitutional Convention: Its History, Powers, and Modes of Proceeding* (New York: Scribner, 1867).

88. Ibid., 9. I give a fuller account of Jameson's reasoning in Roman J. Hoyos, "A Province of Jurisprudence? The Invention of a Law of Constitutional Conventions," in *Law Books in Action: Essays on the Anglo-American Legal Treatise*, ed. Markus D. Dubber and Angela Fernandez (Oxford: Hart, 2012): 108, 117–26.

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Strategic Litigation and the Death of Reconstruction

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RECONSTRUCTION OFFERED hope of meaningful change in the American South. With the federal government in control of the states of the former Confederacy, social, political, and even economic relations in southern society could have been profoundly altered. African Americans could have achieved some significant and lasting measure of equality with their former masters if federal legislators had remained committed to a program of Radical Reconstruction, undergirded by a federal military presence in the states of the former Confederacy. As historian Eric Foner has argued, "Like the Revolution, Reconstruction was an era when the foundations of political life were thrown open for discussion. . . . Despite all its limitations, Congressional Reconstruction was indeed a radical departure, a stunning and unprecedented experiment in interracial democracy."[1] A few months prior to the implementation of Radical Reconstruction in the spring of 1867, Frederick Douglass believed in the possibility of "such a reconstruction as shall put an end to the present anarchical state of things in the late rebellious states—where frightful murders and wholesale massacres are perpetrated in the very presence of Federal soldiers. . . . The South must be opened to the light of law and liberty, and this session of Congress is relied upon to accomplish this important work."[2] Wisconsin senator Timothy Howe also marveled at the revolutionary potential of Congressional Reconstruction to alter the current state of affairs in the United States, telling his wife after the passage of the First Military Reconstruction Act, the centerpiece of Radical Reconstruction, "We have cut loose from the whole dead past and have cast our anchor out a hundred years."[3]

Despite the promise that Congressional Reconstruction offered, the program was short lived and ultimately resulted in failure, if we choose to mea-

sure its effectiveness in social terms. The program of military Reconstruction had ended by 1870, when delegates from all eleven states of the former Confederacy gained readmission to the U.S. Congress. As many historians have argued, the program of military Reconstruction, in place from 1867 to 1870, marked the zenith of federal commitment to real and meaningful change in the former Confederacy and represented the only serious opportunity to dismantle the postwar South's social and political structure.[4] Thereafter, federal oversight of life in the former Confederacy became increasingly minimal, and southern whites reasserted most of their previous dominance over African American southerners. The program of Reconstruction secured the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, but its other long-term consequences were quite limited.

Historians have offered various explanations for the thinness of the congressional commitment to Reconstruction, emphasizing the endemic racism of nineteenth-century Americans, both North and South, the violent campaign of the Ku Klux Klan, and the narrow legalism of Reconstruction's tepid supporters, many of whom remained more committed to maintaining a faithful adherence to principles of federalism than racial equality. By contrast, this essay contends that a primary reason for the brevity of military Reconstruction was a very real fear that the Supreme Court would find the program unconstitutional. A holding invalidating military Reconstruction would necessarily place the validity of the Fourteenth Amendment in serious jeopardy, as the Military Reconstruction Act had secured passage of the amendment by requiring its ratification as the price of readmission for the states of the former Confederacy. Military Reconstruction's early termination resulted in large part from a determination to ensure the survival of its most important product—the Fourteenth Amendment.

Furthermore, the legal challenge to military Reconstruction resulted from a coordinated plan of impact litigation on the part of a group of highly motivated and fiercely determined lawyers. These lawyers, spurred on by virulent racism and intense opposition to the social and legal implications of Reconstruction, attacked the constitutionality of military Reconstruction in the federal courts in a series of related cases designed to expose the program's shaky theoretical basis.[5] The U.S. Supreme Court repeatedly ducked these cases, refusing jurisdiction on a number of grounds. But in late 1869, when the Court indicated that it would rule on the merits in one of these cases and very likely strike down the Military Reconstruction Act, U.S. at-

torney general Rockwood Hoar acted quickly to settle the case. With more cases on the horizon, Congress chose to end the program of military Reconstruction. As Congress well understood, it was far safer to end Reconstruction than to risk the possibility of a declaration of its unconstitutionality, which would seriously jeopardize the survival of the Fourteenth Amendment. Although legal historians have not focused on the coordinated efforts of these attorneys, cause lawyering played a very important role in hastening the early demise of Radical Reconstruction, thus ensuring that the more egalitarian impulses of the Civil War's victors never achieved permanency.

The "Heroic" Bar

During the 1860s, many lawyers, both northern and southern, shared basic concerns about what they perceived as the lawless course of the national government during the Civil War and Reconstruction: civil liberties violations in arresting dissidents for speaking against the war; the substitution of military and other irregular tribunals for trial by jury in prosecuting war criminals and those suspected of disloyalty; Congress's decision to place the formerly Confederate South under military authority pursuant to the Military Reconstruction Acts; and the federal government's seeming willingness to allow violence rather than law to arbitrate the question of secession's constitutionality. Spurred by their belief that the Civil War and Reconstruction represented a break in the nation's deeply held commitment to the rule of law, a number of conservative Democratic lawyers dedicated themselves to a program of strategic litigation designed to undermine Republican Reconstruction policy.[6] These attorneys included Charles O'Conor, Jeremiah Black, Robert J. Walker, James Carlisle, Reverdy Johnson, Philip Phillips, William Sharkey, and John A. Campbell—all highly prominent Democrats committed to defending the rule of law against Republican incursions. In informal and varied groupings, these lawyers worked together on many of the most important cases to challenge the constitutionality of Reconstruction (see table 1).

By far the best-known example of cause lawyering in American history is undoubtedly the long-running twentieth-century effort by the National Association for the Advancement of Colored People (NAACP) to defeat segregation.[7] While in no sense as well organized or as coordinated as the NAACP attorneys who devoted their careers to ending de jure segregation in *Brown v. Board of Education*, the anti-Reconstruction attorneys similarly viewed a

TABLE 1 Prominent Anti-Reconstruction Lawyers and Their Involvement in Reconstruction-Era Cases

Lawyer	Home State	Cases
Jeremiah Black	Pennsylvania	*Ex Parte Milligan*, *Georgia v. Stanton*, *Ex Parte McCardle*, defense of Jefferson Davis, *Slaughter-House Cases*
James T. Brady	New York	Case of the *Savannah*, defense of Jefferson Davis
John A. Campbell	Alabama and Louisiana	*Slaughter-House Cases*, *U.S. v. Cruikshank*, counsel for Samuel Tilden in the electoral crisis of 1876
James M. Carlisle	Washington, D.C.	*Ex Parte Yerger*, *Texas v. White*, *Prize Cases*
David Dudley Field	New York	*Ex Parte Milligan*, *Ex Parte McCardle*, *Test Oath Cases* (*Cummings v. Missouri*), *U.S. v. Cruikshank*
Reverdy Johnson	Maryland	*Ex Parte Garland*, defense of Mary Surratt, *Virginia v. West Virginia*, *U.S. v. Cruikshank*, *Veazie Bank v. Fenno*
Charles O'Conor	New York	Defense of Jefferson Davis, *Georgia v. Stanton*, case of the *Savannah* (informally), *Ex Parte McCardle*, wartime treasonous activities cases (John Mullaly, Ellis Schnabel), counsel for Samuel Tilden in the electoral crisis of 1876
Philip Phillips	Alabama and Washington, D.C.	Defense of Jefferson Davis, *Texas v. White*, *U.S. v. Cruikshank*, *Ex Parte Yerger*, *Osborn v. Nicholson*, *White v. Hart*
George Pugh	Ohio	*Ex Parte Vallandigham*, defense of Jefferson Davis
William B. Reed	Pennsylvania	Defense of Jefferson Davis, wartime free speech and freedom of press cases (William Winder, Pierce Butler)
William Sharkey	Mississippi	*Mississippi v. Johnson*, *Ex Parte McCardle*
Robert J. Walker	Mississippi and Pennsylvania	*Mississippi v. Johnson*, *Georgia v. Stanton*

systematic program of litigation as the most effective way to combat what they perceived to be a constitutionally suspect social program authorized by the legislative branch. United by a common commitment to restoring the rule of law in the face of the constitutional anomalies of the Civil War and Reconstruction, these attorneys affiliated in a loose sense, exchanging correspondence about the outrages of Reconstruction and working together in varied configurations on a series of related cases that attacked Congressional Reconstruction from several different angles. By using litigation to attack the legislative plan of Reconstruction, these lawyers employed, as legal historian Mark Tushnet would define it, "litigation as a social process."[8]

Former Supreme Court associate justice John A. Campbell, who had served as assistant secretary of state in the Confederacy and was subsequently jailed as a military prisoner in Fort Pulaski for six months following the war, considered litigation to be southerners' first line of defense in their quest to end the abuses of Reconstruction. In a pamphlet authored as soon as he secured his release from prison, Campbell presented a highly emotional argument for the importance of defeating the Test Oath, which effectively prevented ex-Confederates from practicing law in many of the federal courts until it was invalidated by the Supreme Court in early 1867.[9] The Test Oath required its adherents to swear their uninterrupted loyalty to the United States in order to be admitted to the federal bar, and it accordingly precluded former Confederates from practicing in those courts. In Campbell's opinion, southerners needed to be able to fight Reconstruction in the federal courts on their own behalf, a task that could be undertaken only if they could be readmitted to the federal bar. As Campbell queried rhetorically, "What will be the fate of these Southern States by the degradation of their bar?" Quite melodramatically, he likened white southerners' "suffering" to the yoke of Babylonian rule in Jerusalem, even invoking Jeremiah's lamentation: "Our inheritance is turned to strangers, our houses to aliens. We are orphans and fatherless; we have drunken our water for money; our wood is sold unto us; our necks are under persecution; we labor and have no rest; servants have ruled over us; there is none to deliver us out of their hands."[10] Without a hint of irony, Campbell insisted that white southerners suffered far more acutely than the Israelites of old precisely because his fellow southerners had entertained a reverence for the rule of law throughout their lives and were now experiencing the "woe particularly oppressive to men reared under the judiciary institutions of this Southern land—the woe that judgments shall be rendered in the courts without any assurance or

confidence of accompanying justice." Justice could be secured only if southerners were permitted to practice in the federal courts, as "there cannot be any doubt that this woe will not befall the land that has a firm, fearless, honesty, and, if need be, heroic bar, in sympathy with the people. [Only] woe . . . befalls that land on whose judgment seats strangers sit."[11]

Campbell fully expected that once readmitted to federal court practice, southern lawyers would immediately turn their attention to counteracting what he viewed as the unlawful policy of "reconstructing" the states of the former Confederacy by stripping them of control of their own affairs and replacing the states' authority with federal military rule. Even if the Reconstruction government had perverted the Constitution beyond recognition, Campbell pledged that southern attorneys would staunchly defend "what remains of the constitution of their country, [and] still raise their voice against any radical reconstruction of the institutions of the United States." In impassioned language, Campbell acknowledged that the efforts of southern advocates to stem the tide of Reconstruction might well prove futile, as "the fierce and revolutionary legislation of the war" might withstand constitutional challenges in these uncertain times. Nonetheless, even though the judiciary itself had hardly escaped the tumult of the war and Reconstruction, Campbell remained convinced that courts constituted the best—and indeed, the only—forum that might prove receptive to a constitutional challenge against Reconstruction. "We make our first appeal to the judiciary department," he wrote, "which has not escaped the revolutionary storm, to rouse itself to the assertion of its great responsibilities, and to the performance of its paramount obligations to the cause of constitutional liberty, and good government."[12]

The Ideology of the Anti-Reconstruction Lawyers

The anti-Reconstruction lawyers shared a common belief in the utmost sanctity of the rule of law and the attendant necessity of strict adherence to the letter of the Constitution, which they believed had been undermined by the extraordinary actions of the federal government during and after the Civil War. In their opinion, no constitutional basis existed to justify the imposition of even temporary federal military rule in the defeated southern states, the exclusion of their elected representatives from Congress, and the mandate that the states ratify the new constitutional amendments. Equally repugnant was the requirement that the states of the old Confed-

eracy write new state constitutions and grant basic civil rights to their African American residents. Anti-Reconstruction lawyers dismissed the constitutional arguments of the Republican proponents of these measures, who contended that their actions following the Civil War rested on a legal foundation. Republican theorists argued variously that the Constitution's guarantee of republican government permitted the government to reconstruct the seceded states; that the exigencies of war allowed a temporary expansion of federal power in the southern states, which remained in a state of war even though the firing had ceased; or that the federal government had conquered the Confederacy and could thereby permissibly treat the defeated states as territories.[13] The men of the conservative bar believed that such arguments stretched the Constitution beyond its limits; for them, Reconstruction transgressed the bounds of federal authority under the Constitution and invaded the sovereignty of the states.

As conservative northern attorney William B. Reed maintained, the nation should be concerned about the dangers of "consolidation, [which], in one form or another, is the great machine of power." Speaking during the war, Reed warned his Philadelphia audience that the war would result in the complete eradication of the states. "When the South is conquered," he asserted, "the lines of States, here and there, for the purpose of convenient government, are to be rubbed out, or made so faint and indistinct that no one will care for them, and a vast colonial military tenure will be created to ensure easy subjection."[14] As members of the bar, Reed and his cronies considered it their particular province to reassert the primacy of the rule of law and to seek to counteract the lawlessness of Reconstruction. In advancing their unpopular cause, they began to feel isolated from and even persecuted by mainstream northern society. Burton Harrison, a former Confederate who became a lawyer in New York following his release from prison after the war, happily reported to his fiancée that he had found a kindred spirit in Reed. Dining with Reed and a number of like-minded Philadelphians when he visited the city, "nearly all [of whom had] been *mobbed* during the war for their steadfast principles," Harrison told his future wife that "we . . . constituted an assemblage the most 'treasonable' which has gathered in the State of Pennsylvania since Genl Lee's army crossed its borders after the battle of Gettysburg."[15]

The destruction of the rule of law as a result of Reconstruction became a frequent topic of discussion among the conservative men of the bar, many of whom shared long-term friendships, undoubtedly based on their com-

mon political affiliation and their common feeling of isolation. A tone of despair permeated their correspondence, as did a sense of determination to do what was possible to combat the evils they saw surrounding them. For example, in the summer of 1865, Boston attorney Thomas W. Pierce, who collaborated with former attorney general Jeremiah Black on the defense of former Confederate Clement Clay (accused of conspiring to assassinate Abraham Lincoln), wrote to Black about the havoc the war had wrought on the rule of law. Pierce asserted that in the past, "reason, operation, & Justice triumph[ed], but these are all passed away." Pierce harkened back to the days when "law was recognized," wondering if it was possible that "they will not even now return? We must hope and labor to this end even though we fail."[16]

Attacking the Military Reconstruction Acts

After the war, as the conflict between the Radical Republican Congress and conservative Unionist president Andrew Johnson over the direction of Reconstruction escalated, the anti-Reconstruction attorneys focused their litigation strategy on dismantling the Military Reconstruction Acts, the first of which passed in March 1867.[17] In a series of interrelated cases, the attorneys directly attacked the federal military presence in the states of the former Confederacy and indirectly challenged the validity of the postwar amendments and the program of partial racial equity put in place by the Reconstruction Acts. As former Confederate commissioner Beverley Tucker told his brother, Randolph, southern attorneys and their conservative northern allies should concentrate their litigation efforts on the Military Reconstruction Act, which, as the centerpiece of Radicalism, undermined the fundamental "right of the State to regulate its internal concerns."[18] As Charles Fairman has pointed out in his exhaustive history of the innumerable thorny constitutional problems of Reconstruction, "In the period of Reconstruction, each item [of litigation] seems to be related to everything else."[19] The anti-Reconstruction lawyers recognized that the program of military Reconstruction was vulnerable to attack from many different angles. When one path of litigation closed, they repeatedly investigated and pursued alternate options. The Supreme Court ultimately failed to invalidate the congressional plan of Reconstruction for principled reasons, as historian Stanley Kutler has demonstrated, but its path remained unpredictable to contemporary observers.[20]

Ex Parte Milligan

Jeremiah Black's first foray came in *Ex Parte Milligan*, in which he challenged the military detention and trial of an Indiana newspaper editor. The Court invalidated Milligan's conviction, ruling that all persons living in states "where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury."[21] Hailed today as the "palladium of the rights of the individual" and "the bulwark of American liberty," *Milligan*'s broad holding condemned the substitution of "martial rule" for regularly constituted civil tribunals when "actual war" did not exist.[22] As such, the ruling seemingly applied with equal force outside Unionist areas—to formerly Confederate territory—since the surrender of the Confederate armies had marked the end of "actual war" in those areas.

The *Milligan* ruling thus energized the anti-Reconstruction lawyers, who began to trust that the Court might act as an ally in their battle against Reconstruction. The Court's invalidation of the permanent legal disabilities imposed against those southerners who could not swear the Test Oath in *Ex Parte Garland* (1866) and *Cummings v. Missouri* (1867), permitting ex-Confederates to practice in the federal courts, gave Reconstruction's opponents hope that the Court might stand against the Congress and invalidate pieces of Reconstruction legislation that violated the Constitution. *Ex Parte Milligan*, handed down in late 1866, confirmed this belief.[23] As Kutler has asserted, the opinion "particularly stimulated Democratic hopes for judicial salvation."[24]

Black publicly rejoiced at the outcome of the *Milligan* case as soon as the Court announced the expansive grounds of its decision. At a Democratic dinner in Washington in early January 1867, a toast was offered to "the Supreme Court of the United States—The great conservative power of the government; never more needed or better appreciated than now." In response to the toast, Black delivered a speech heaping praise on the Court—while indirectly criticizing the other branches of government—for its willingness to defend constitutional liberty and incur the wrath of the Radicals in Congress and in the press. Black lamented that the Court had come under attack by Radicals who seemed to believe that "if the law stands in our way so much worse for the law," but he noted that the *Milligan* ruling indicated that the judiciary was willing to defend the Constitution against such attacks.[25] Black's speech, which was widely reprinted in the newspapers, irked former U.S. attorney general James Speed, who wrote to legal academic Francis

Lieber to complain about Black's remarks. In Speed's judgment, the speech revealed that Black was too motivated by partisan considerations in his career as an advocate, such that "every elevated member of the profession was disgusted with Judge Black's vulgar talks at the eighth of Jan[uar]y dinner. The lawyer who is not conscious of how much his judgment is swayed & controlled by a feeling of advocacy wants good sense—that sort of common sense that commands the attention and respect of men." Speed maintained that an advocate could not responsibly comment publicly on the court's decisions, as such an action invited the public to doubt the Court's neutrality and to question the legitimacy of judicial review. Speed also revealed his fear that if Black and his cronies could engage the general public in a critique of the legal basis of Reconstruction, the Court would have no choice but to submit to the popular determination of the constitutional basis of Reconstruction. "Besides," he told Lieber, "I can not rid myself of the feeling that I am appealing from the Court to the people through the news papers and that the Court has not an equal chance."[26]

After the Court's announcement of the *Milligan* ruling, the anti-Reconstruction lawyers set out to test the scope of the holding. As the opinion outlawed "martial rule" and military commissions unless "actual war" existed, it seemed as though its holding would apply equally in the formerly Confederate South, where active military engagements had long ceased but the operation of martial law and the functioning of military commissions continued. In fact, the power to declare an end to the state of war existing in the South had become a major issue in the political battle between the conservative president and more radical Congress in their battle for control over Reconstruction policy, and the *Milligan* ruling signaled the Court's possible willingness to become involved in the dispute and arbitrate between the executive and legislative branches.

On the strength of the *Milligan* opinion, President Johnson discharged Dr. James L. Watson, who had been slated for trial before a military commission in Virginia on suspicion that he had shot an African American man, believing that the Court had outlawed military commissions throughout the United States.[27] Soon afterward, attorney Reverdy Johnson (who had represented Mary Surratt in the trial of the Lincoln conspirators and ex-Confederate lawyer Augustus Garland in his bid to be readmitted to legal practice in the federal courts), sought a writ of habeas corpus to discharge Dr. Samuel Mudd—tried by military commission in Washington for his involvement in Lincoln's assassination—from imprisonment at hard labor in

Fort Jefferson.[28] Like the president, Reverdy Johnson believed that the *Milligan* holding could have far-reaching consequences, potentially invalidating the operation of any military tribunal since Appomattox.

Milligan's language suggested that the cessation of actual hostilities and the conclusion of an emergency situation were questions of fact that could not be altered by the declarations of the political branches of government. Congress and the president wrangled over the authority to declare the cessation of hostilities, because the existence of a "state of war" in the former Confederacy would provide a justification for the continued imposition of federal authority in the South. In April 1866, the president had declared the rebellion to be at an end and the southern states restored to a state of normalcy as "constituent communities only as States, and not as Territories, dependencies, provinces, or protectorates," thus ensuring the cessation of "standing armies, military occupation, martial law, military tribunals, and the suspension of the privilege of the writ of habeas corpus."[29] Attorney General Henry Stanbery considered the president's proclamation to be effective in eradicating military tribunals in the South and declared that there "is nothing in the present condition of Virginia to prevent the full exercise of jurisdiction of the civil courts."[30] Congress vehemently opposed the president's assertion of power in this area and, in the first Military Reconstruction Act, passed over Johnson's veto, gave complete authority over the former Confederate states (except Tennessee) to five military commanders, who retained the ability to organize military tribunals to try offenders if, in their judgment, the civil courts were ineffective. In addition to imposing military rule in the South, the Reconstruction Act required the ten ex-Confederate states to write new constitutions that provided the elective franchise to all male citizens, regardless of race, and to ratify the Fourteenth Amendment in order to qualify for representation in the U.S. Congress.[31] As the opponents of Reconstruction realized, if the Supreme Court could not be persuaded to invalidate the Reconstruction Act on the grounds that it impermissibly altered the delicate balance between state and federal authority, the act remained vulnerable to legal attack based on its authorization of military tribunals, which seemed highly suspect under the *Milligan* holding.

Mississippi v. Johnson

The first constitutional challenges to the Military Reconstruction Act came almost immediately after its passage and directly attacked federal military

oversight of the states of the former Confederacy. On behalf of the state of Mississippi, attorneys Robert J. Walker, Augustus Garland (the disfranchised attorney of *Ex Parte Garland*), and William Sharkey filed an original suit in the Supreme Court against President Johnson, seeking an injunction to prevent him from enforcing the Reconstruction Acts. Sharkey acted as the catalyst behind the suit. A wartime Unionist and staunch ally of President Johnson who had served as Mississippi's first postwar military governor, Sharkey had been in Washington as a political observer at the time of the passage of the Military Reconstruction Act in March 1867. He updated the current governor of Mississippi, Benjamin Humphreys, about the legislation's progress in Congress; Sharkey considered the measure a direct threat to the rights of Mississippians. He warned Humphreys that "it seems we are to be placed under martial law—This aspect of affairs is terrific, threatening in the extreme."[32]

In response, Humphreys authorized Sharkey to initiate a legal campaign on behalf of the state to halt the operation of the Military Reconstruction Act. Sharkey filed the bill in equity he had prepared on April 1, 1867. Pleased with his work, Sharkey told the governor that he had wanted to act boldly and "wish[ed] to bring the question directly before the Supreme Court." He was cautiously optimistic about his chances for success, believing that the law was on his side, although the volatile political climate might prevent the Court from invalidating the legislation. As he told Humphreys, "It may turn out that I have made an April fool of myself, though I think not. Indeed I have no doubts about the law, the only doubt that hangs on the question is in the court, some of the judges being very radical." Sharkey believed, without complete confidence, that he could "rely upon [Justices] Grier, Nelson, Davis, Clifford, and Field" to strike down the act and counted Justice Wayne as a possible ally. He also enlisted the help of his old friend and sometime Mississippian Robert J. Walker, as Sharkey "did not like to engage in so large an enterprise myself, as it will be the most important law suit ever tried, and being better acquainted with Robert J. Walker than with others here [in Washington], and knowing him to be a good constitutional lawyer, I have engaged him." Walker's southern loyalties were suspect as he had deserted Mississippi and supported the Union cause and lived in Washington during the war, but Sharkey hastened to reassure Humphreys that Walker "enters into [the case] heart & soul, and says he owes Mississippi a debt of gratitude which he will try and pay." Sharkey and Walker hoped to induce other ex-Confederate states to join the action despite its risks, but they re-

alized that "this may be doubtful, as some of them seem to be anxious to swallow the bitter pill, like a trout at a bait, before it is even ready." And he warned Humphreys, "if they will join they could ill afford to pay a good fee." Sharkey was prepared to "go it alone for little Mississippi," reasoning that "I have nothing to lose."[33]

Confronted by naysayers in the southern press who insisted that the Court would never strike down the new act, Sharkey began to entertain some doubts about the likelihood of success. Sharkey telegraphed Governor Humphreys for advice, complaining that "our papers and writers [are a] God-send to radicals. Crippling me. What is your wish go ahead or not."[34] Humphreys gave his assent, and the suit went forward, although the Court ultimately bore out the press's predictions and dismissed the case for lack of jurisdiction. The Court refused to hear the case on the merits, maintaining that a court of law could not issue an injunction against a sitting president who performed his ministerial duties by simply carrying an act of Congress into effect. The Court would not substitute an injunction against the president for a direct challenge to the act's constitutionality. It was improper for the Court to interfere in the regular actions of a coequal branch of government, as it was impossible for the judiciary as a practical matter to restrain the president, who would face conflicting obligations to carry out the will of Congress in following the dictates of the act and in obeying the dictates of the Court. Even though a state was permitted to invoke the original jurisdiction of the Court and file a bill in equity against the United States, the Court was "fully satisfied that this court has no jurisdiction of a bill to enjoin the president in the performance of his official duties; and that no such bill ought to be received by us."[35]

Georgia v. Stanton

Stymied by the Court's refusal to enjoin a president in the exercise of his official duties, the attorneys—Walker and Sharkey, along with Black and O'Conor—next filed suit on behalf of the state of Georgia, seeking an injunction against Secretary of War Edwin Stanton rather than the president.[36] Arguing the case before the Supreme Court, O'Conor charged that the Reconstruction Act subverted the governments of the southern states and replaced them with military despotisms. In fact, O'Conor and his cohort devoted most of their brief solely to the jurisdictional issue, in essence taking for granted the idea that the act was unconstitutional. "It has thus far been

assumed, rather than asserted or proven," the attorneys argued, "that the Military Reconstruction Acts are unconstitutional. To offer detailed proofs, or urge arguments in support of that position, might fairly be considered as an affront to the intelligence of the Court." Their brief stated simply that "the Military Reconstruction Acts involve a complete extinction of State power over any of the State's own internal affairs. At a single stroke they convert the Union into a Consolidated Government."[37]

O'Conor's oral argument in *Georgia v. Stanton* exposed his determination to prevent the federal government from investing newly freed African Americans in the South with political power and thereby effecting larger social change in the former Confederacy. The act was objectionable, O'Conor maintained, because it would "seize upon a large portion—whites—of the constituent body and exclude them from acting as members of the state. It violently thrusts into the constituent body, as members thereof, a multitude of individuals—negroes—not entitled by the fundamental law of Georgia to exercise political powers. The State is to be Africanized."[38] O'Conor's tirade in *Stanton* underscores the point that the wrangling of attorneys, politicians, and jurists over the extent of federal and state power during Reconstruction had profound real-world consequences, particularly for black southerners. As Eric Foner's seminal *Reconstruction* details, racial equality (to the limited extent it was achieved in the post–Civil War South) depended on the federal government's commitment to maintaining a military presence in the former Confederacy as well as the efforts of formerly enslaved people to assert their newfound freedom.[39] The stakes of the litigation campaign against the Reconstruction Act were astronomical; the act supplied the legal grounds for dismantling white supremacy in the South. Not only would federal military supervision in the southern states come to an end if the Supreme Court declared the act unconstitutional, but the Fourteenth Amendment would also probably be lost, as Section Five of the Military Reconstruction Act had secured the new amendment's ratification by the former Confederate states. If the act were declared unconstitutional, likely the amendment would be as well. As Charles Fairman points out, a "decision condemning the Reconstruction Act would brand with illegitimacy all that had been accomplished. The possible consequences—legal, political, and moral—were incalculable; they might have proved catastrophic."[40]

Many in the press also regarded the lawyers' efforts in the Mississippi and Georgia cases as bold and even frightening attempts to revitalize an extreme state sovereignty position that endorsed secession as a valid constitutional

right and should accordingly have been rendered invalid by the Civil War. Remarking on the scene at the U.S. Supreme Court during oral argument in *Mississippi v. Johnson*, the *Cleveland Herald* dubbed the litigation effort "Sharkey's New Rebellion" and described the audience in the courtroom as "rebels and sympathizers, who did not look as though they were aware that the late rebellion was over." The paper praised Attorney General Stanbery for his effective attack on the arguments raised by "the formidable array of legal talent engaged in this new crusade against the peace of the country."[41] The *New York Herald*, hardly a bastion of Radical Republicanism, criticized O'Conor's argument in *Georgia v. Stanton* for containing "all the old preposterous Southern twaddle of State sovereignty and reserved State rights, including the right of secession, the right of rebellion and the right, after rebelling, to return untouched to the rights of the Union."[42] After reading newspaper accounts of oral arguments in the Georgia case, Missouri Supreme Court judge William B. Napton wrote in his diary that "Mr. Black and Mr. O'Conor take ground against the war itself, not directly, but such is the tendency of their speeches."[43]

As it had in the Mississippi case, the Supreme Court again refused jurisdiction in *Georgia v. Stanton*, this time on the grounds that the question implicated in the case was political rather than strictly legal and thus could not be resolved by a court of law. According to the Court, "That these matters . . . call for the judgment of the court upon political questions and upon rights not of persons or property but of a political character will hardly be denied. For the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a state, with all its constitutional powers and privileges."[44] With the Court's declaration that broad political rights (as opposed to individual rights) would not be adjudicated in a court of law, it became very clear that a direct assault on the act would prove futile.

Ex Parte McCardle and Ex Parte Yerger

Stanton proved to be a substantial but not insurmountable stumbling block. As the Court had foreclosed a direct attack on military Reconstruction policy, the attorneys sought an end run around *Stanton* by using *Ex Parte Milligan* to challenge Congressional Reconstruction. While the *Stanton* case was pending, Secretary of War Gideon Welles wondered "why O'Conor and his associates make no use of the recent decision of the Court in Milligan's

case. . . . Congress, under color of law, cannot invest brigadiers with power to abolish jury trial or to suspend the privilege of habeas corpus in time of peace."[45] His observations proved prescient, and *Milligan* provided the basis of the attorneys' next mode of attack on the Military Reconstruction Act.

On the strength of *Milligan*'s dictum that military tribunals were impermissible in the absence of active hostilities, O'Conor, Black, Sharkey, and David Dudley Field filed a habeas petition on behalf of William McCardle, a Mississippi newspaper editor who had been arrested by the state's military commander for his incendiary writings and faced trial before a military commission.[46] The attorneys challenged both McCardle's impending military trial and—more broadly—the system of military government in Mississippi put in place by the Military Reconstruction Act, alleging that "military government is prohibited by the Constitution."[47] McCardle's petition was first heard by the federal circuit court in Jackson, which ruled against him. His attorneys filed an appeal in the Supreme Court pursuant to the Habeas Corpus Act of 1867, which permitted direct appeals from the circuit courts to the Supreme Court.

But after the case had been argued in the Supreme Court in 1868, fear swept through Congress that *McCardle* might well prove successful in challenging the Military Reconstruction Act. The case turned directly only on the legitimacy of military tribunals, but it also implicated the larger principle of unprecedented congressional grants of virtually untrammeled authority to military commanders.[48] In response to *McCardle*, Congress decided that repealing the Habeas Corpus Act of the previous year, thus removing the Court's ability to hear appeals under the act, would prove less risky than allowing the Court to forge ahead with the case, with potentially disastrous consequences. The Court was left to determine whether Congress's actions in repealing the 1867 Habeas Corpus Act, done with the unconcealed purpose of preventing a particularly unsavory outcome in a pending case, met constitutional muster. In *McCardle*, the Court again effectively avoided confronting the constitutional problems with the Military Reconstruction Act in favor of a jurisdictional resolution, dismissing the suit and affirming that Congress had the plenary power to alter the Supreme Court's appellate jurisdiction and that "we are not at liberty to inquire into the motives of the legislature."[49]

Undeterred, Philip Phillips and James M. Carlisle forged ahead and sought a writ of habeas corpus on behalf of Edward Yerger, a Mississippian who had stabbed the mayor of Jackson to death and faced trial before a mil-

itary commission.[50] Because *McCardle* had confirmed the unavailability of appeals under the 1867 habeas act, Yerger sought his habeas appeal pursuant to the Judiciary Act of 1789. The Court decided that its power to hear habeas claims on the basis of the Judiciary Act of 1789 was unaffected by Congress's 1868 repeal of the previous year's habeas act. The Court chose to construe the 1868 act narrowly, highlighting the importance of the availability of the writ and an appeal from its denial in finding that "the repealing section of the act of 1868 is limited in terms, and must be limited in effect to the appellate jurisdiction authorized by the act of 1867."[51]

The Court's decision in *Yerger* had potentially devastating implications, as it indicated the Court's willingness finally to tackle a Reconstruction challenge on its merits and quite possibly invalidate the shaky constitutional foundation of military Reconstruction. As Fairman argues, if, "as was to be expected, the Government lost: that would impugn the new constitutional foundation, as well as the new Southern governments."[52] Rather than risk such a catastrophic outcome, Attorney General Hoar decided to settle with Yerger. Although Phillips and Carlisle viewed Yerger's case as a means to an end (that is, impugning the constitutionality of the Military Reconstruction Act), their client's needs took precedence over their commitment to their cause. In October 1869, Phillips and Carlisle reached a settlement in Yerger's suit that had Yerger remanded to the local jail for trial by state authorities, who were to deal with Yerger's case as soon as the state was readmitted to the Union and the program of military Reconstruction concluded. After reaching this conclusion, Phillips wrote to Yerger's uncle, Judge William Yerger, about his satisfaction in saving his client from trial before a military tribunal. "This movement has been a fortunate one," he wrote, "as without a doubt it has saved the life of the applicant."[53]

Texas v. White

While *McCardle* and *Yerger* challenged the system of military tribunals under the Reconstruction Act, Phillips (in association with Carlisle and Albert Pike) argued *Texas v. White* on behalf of the respondents before the Supreme Court, attacking Reconstruction from yet another angle. In this case, Texas filed suit against bondholders whom the state claimed had never provided payment for the bonds. As a state, Texas was entitled to invoke the Court's original jurisdiction—but only if Texas was, in fact, a state.[54] The uncertainty of Texas's statehood gave another point of entry for Reconstruc-

tion agitation, as the lawyers sought to expose the inconsistency of the U.S. government's position concerning the postwar status of the states of the former Confederacy.

Texas's murky legal status necessarily implicated the incendiary issue of the constitutionality of state secession from the Union. As Reconstruction's opponents contended, if a state were part of the Union, then it could not be governed by Congress, as federal control would violate the state's basic sovereignty and run afoul of the precept that all states were to be treated equally.[55] Conversely, accepting the proposition that a state was somehow outside the Union seemed to sanction secession's legitimacy, as the exercise of the purported right would have thus had its intended effect. In addition, viewing the former Confederate states as outside the Union fold threatened the validity of the post–Civil War amendments, which had been ratified with the votes (coerced though they were) of former Confederate states. By simultaneously placing these states under federal military authority and yet counting their votes for purposes of ratifying constitutional amendments, former Confederate states thus appeared to be in the Union for some purposes but not others. To the anti-Reconstruction lawyers, it appeared unfathomable that the Court would continue to countenance this muddled duality, and an important part of their litigation strategy against Reconstruction consisted of highlighting this contradiction in the hopes that the Court would accordingly condemn Reconstruction's shaky constitutional basis. Because *Texas v. White* turned on the state's membership in the Union, the lawyers sought to force the Court finally to confront this all-important issue.

The anti-Reconstruction lawyers hoped that their relentless application of pressure would force (or embarrass) the Court into choosing between one theory or another; the government would be forced to clarify its position on the states' inclusion in the Union.[56] In the midst of litigating the *Texas* case, Phillips believed so strongly that the Court would take a stand on the status of the states and recognize their exclusion from the Union as a consequence of Reconstruction that he assured his client (one of the bondholders) of his utmost "confidence in the opinion that the Court will not take jurisdiction of the case"—because Texas was not a state. Indeed, because "there are large interests lying behind awaiting this decree, and dependent upon the argument in this case," Phillips informed White that "if I succeed in defeating the bill, I ought to have an increased compensation."[57]

Writing for the Court in *Texas v. White*, Chief Justice Salmon P. Chase dashed Phillips's hopes by insisting that Texas was a state, as it had never left

the Union. At the same time, Chase maintained, Texas did not have a valid state government throughout the war, thus "draw[ing] a plain distinction . . . between a State and the government of a State." Because Texas did not possess a republican form of government at the close of the war, the national government was required to provide one for the state, which it had done through military Reconstruction.[58] In this way, Chase sought to reconcile his conclusion about Texas's statehood with congressional policy and render a decision that condemned secession while avoiding "conflict with any act or declaration of any department of the National government, but [remaining] entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion."[59] In his brief, Phillips had characterized the contention that a distinction existed between "the *State government* and the *State*" as patently ridiculous. "Without intending to deal harshly with this proposition," he wrote, "I may be permitted to quote the language of this Court on a former occasion: 'A state can only act though its agents, and it would be absurd to say that any act was not done by the State which was done by its authorized agents.'"[60] Co-counsel Albert Pike expressed disgust with the Court's decision, which he characterized as "judicial folly," writing, "All the people of Texas were not Texas! There was no secession government de facto of Texas! Such nonsense the Court gravely gabbled."[61]

The Next Case?

In spite of Chase's neat resolution of *Texas v. White*'s immediate statehood problem, the progress of the anti-Reconstruction litigation had a significant impact on Congress's calculus when it came to the progress of military Reconstruction. At the time that Phillips and Carlisle reached a settlement in *Ex Parte Yerger* in October 1869, four ex-Confederate states remained outside the Union: Georgia, Texas, Virginia, and Mississippi. These states had not yet ratified the Fifteenth Amendment, and the Military Reconstruction Act required a state's assent only to the Fourteenth Amendment to qualify for readmission. But to secure the four unreconstructed states' ratification of the new amendment at a time when its ultimate passage seemed in doubt, Congress could keep the states out of the Union indefinitely, with ratification as the price of readmission. In the climate of the anti-Reconstruction litigation, this option was also quite risky, as delaying readmission kept the Military Reconstruction Act in effect and left the constitutionality of the act in contention. Lawyers could (and would) continue to bring cases to chal-

lenge the act, and it seemed possible that the Court might eventually sustain their contentions. In the wake of *Yerger*'s uneasy settlement, it could prove very dangerous to leave the states out of the Union and leave military Reconstruction vulnerable to legal challenge, as an adverse ruling would threaten the viability of the Fourteenth Amendment, for its passage had been secured only via the Military Reconstruction Act. In late December 1869, Senator Oliver Morton of Indiana proposed a solution: Congress could readmit the four outstanding unreconstructed states and require their ratification of the Fifteenth Amendment as a condition for their readmission, either as a condition precedent or a condition subsequent.[62]

The quick reconstruction of the remaining ex-Confederate states accordingly entangled with the frightening prospect of the Supreme Court's willingness to sustain the arguments of the anti-Reconstruction lawyers. On the same morning that the Senate debated the bill to require ratification of the Fifteenth Amendment as a condition of readmission, Senator Allen Thurman of Ohio introduced a resolution in the Senate that asked for information about Hoar's settlement of the *Yerger* case and requested that the attorney general supply any agreements made between him and opposing counsel in the case. Thurman considered the deal struck in *Yerger* to be relevant to his consideration of whether "Congress by any legislation should take away or restrict the jurisdiction of the Supreme Court to hear and determine the proceedings before said court for the discharge of said Yerger on habeas corpus."[63]

Later that morning, the Senate debated a bill that would have cut off the Supreme Court's jurisdiction in cases that involved political questions such as Reconstruction. Its proponents sought to insulate crucial Reconstruction legislation from the possible invalidation, and they further insisted that the bill did not infringe the independence of the judiciary because it merely reinforced the Court's pronouncements about its jurisdictional inability to hear political cases (as articulated in *Mississippi v. Johnson*). Senator Lyman Trumbull of Illinois noted the disturbing frequency with which cases challenging the constitutionality of the Reconstruction acts found their way before the Court: "I do not understand that there is any case pending in the Supreme Court of the United States at this moment involving the validity of what are known as the reconstruction acts; but there have been efforts made from the beginning to get such cases before the court. Bills were filed on the part of what claimed to be the State of Georgia at one time, and then by

what claimed to be the State of Mississippi, with a view of bringing before the judicial tribunals the question as to what constituted a State, a question with which the judicial tribunals have nothing to do." Trumbull recognized that the danger was not over, as "it is apprehended that other attempts may be made to bring such cases before the courts." Indeed, he had recently been informed that "another [such] case is pending from Texas."[64]

With the prospect of more cases on the horizon, it was wise to put an abrupt end to military Reconstruction and readmit the remaining ex-Confederate states as quickly as possible. Spurred on by a deep-seated worry about the war's destruction of the rule of law, the anti-Reconstruction advocates sought to compel an end to Reconstruction through judicial declaration. These efforts to derail Reconstruction met with surprising (though indirect) success in exposing the shaky theoretical basis of military oversight in the post–Civil War South. As they pointed out in case after case, Reconstruction's constitutionality depended, ironically, on secession's effectiveness in carrying the ex-Confederate states out of the Union. As a result, Radical Reconstruction's proponents chose to end the program prematurely and ensure the survival of the Fourteenth Amendment rather than risk judicial recognition of such a combustible principle.

NOTES

1. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper and Row, 1988), 278–80.

2. Frederick Douglass, "Reconstruction," *Atlantic Monthly*, December 1866.

3. Foner, *Reconstruction*, 280.

4. See Michael Les Benedict, *Preserving the Constitution* (New York: Fordham University Press, 2006), chapters 1, 9; William Gillette, *Retreat from Reconstruction* (Baton Rouge: Louisiana State University Press, 1979).

5. For more on the extraordinary constitutional basis of Reconstruction, see Harold Hyman, *A More Perfect Union* (Boston: Houghton Mifflin, 1975) (arguing that the Civil War and Reconstruction gave rise to a new era of previously unimaginable federal power), Bruce Ackerman, *We the People: Transformations* (Cambridge: Belknap Press of Harvard University Press, 1998), 100 (viewing Reconstruction as a "transformative" constitutional moment when "the Republicans played fast and loose with the Federalists' text"), and Stanley Kutler, *Judicial Power and Reconstruction Politics* (Chicago: University of Chicago Press, 1968) (asserting that the Supreme Court acted with newfound authority in sustaining the revolutionary aspects of Reconstruction).

6. See Phillip S. Paludan, "The Civil War Considered as a Crisis in Law and Order," *American Historical Review* 77, no. 4 (1972): 1013–34.

7. See Genna R. McNeil, *Groundwork* (Philadelphia: University of Pennsylvania Press, 1983); Richard Kluger, *Simple Justice* (New York: Knopf, 1977); Mark V. Tushnet, *The*

NAACP's Legal Strategy against Segregated Education, 1925–1950 (Chapel Hill: University of North Carolina Press, 1987); Kenneth W. Mack, "Rethinking Civil Rights Lawyering and Politics in the Era before Brown," *Yale Law Journal* 115, no. 2 (2005): 256–354.

8. Tushnet, *NAACP's Legal Strategy*, xi. On the history of cause lawyering, see Keith Weldon Medley, *We as Freemen: Plessy v. Ferguson* (Gretna, La.: Pelican, 2003); Peter H. Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982); Daniel Ernst, *Lawyers against Labor: From Individual Rights to Corporate Liberalism* (Urbana: University of Illinois Press, 1995); Benjamin Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (Westport, Conn.: Greenwood, 1973); Steven Teles, *The Rise of the Conservative Legal Movement* (Princeton: Princeton University Press, 2008).

9. *Ex Parte Garland*, 71 U.S. 333 (1867).

10. Lam. 5:2–5 (King James Version).

11. John A. Campbell, *Observations Respecting the Test Oath, Imposed upon Attorneys by Congress* (n.p., 1865 or 1866), 34–35. See Robert Saunders, *John Archibald Campbell: Southern Moderate, 1811–1889* (Tuscaloosa: University of Alabama Press, 1997), 211, for confirmation of Campbell's authorship.

12. Campbell, *Observations*, 46. See also Michael Ross, "Obstructing Reconstruction: John Archibald Campbell and the Legal Campaign against Louisiana's Republican Government, 1868–1873," *Civil War History* 49, no. 3 (2003): 235–53.

13. For a discussion of these theories of Reconstruction, see Benedict, *Preserving the Constitution*, chapter 1.

14. William B. Reed, *A Northern Plea for Peace* (London: Mackintosh, 1863), 17.

15. Burton Harrison to Constance Cary, July 13, 1866, Burton N. Harrison Family Papers, Manuscripts Division, Library of Congress, Washington, D.C. (LC). Reed, who at one point tentatively advocated Pennsylvania's secession from the Union, had his house surrounded by an anti-Copperhead mob that dispersed only when an African American servant floated the American flag from his window. See Arnold Schankman, "William B. Reed and the Civil War," *Pennsylvania History* 39, no. 4 (1972): 460, 462.

16. T. W. Pierce to Jeremiah Black, June 13, 1865, Jeremiah Black Papers (microfilm edition), LC.

17. See Eric McKitrick, *Andrew Johnson and Reconstruction* (Chicago: University of Chicago Press, 1960).

18. Beverley Tucker to John Randolph Tucker, June 11, 1868, Tucker Family Papers, Southern Historical Collection, University of North Carolina, Chapel Hill. Beverly Tucker was charged, along with Davis and Clay, with participating in Lincoln's murder. He evaded arrest by fleeing to Canada.

19. Charles Fairman, *Reconstruction and Reunion, 1864–1888* (New York: Macmillan, 1971), 1:239. My analysis of the intersection of the major cases to challenge the Military Reconstruction Acts is largely drawn from Fairman's careful parsing of the cases, although my account highlights the activities of the attorneys who pushed the litigation forward rather than focusing on the Supreme Court.

20. Kutler, *Judicial Power and Reconstruction Politics*, chapter 6.

21. *Ex Parte Milligan*, 71 U.S. 2, 123 (1866).

22. For praise of *Milligan*, see Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, 1922), 3:149; Peter Irons, *War Powers: How the Imperial Presidency Hijacked the Constitution* (New York: Macmillan, 2006), 84–86; Samuel Isaacharoff and Richard H. Pildes, "Between Civil Libertarianism and Executive Unilateral-

ism: An Institutional Process Approach to Rights during Wartime," *Theoretical Inquiries in Law* 5, no. 1 (2004): 110–11; John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (New York: Atlantic Monthly Press, 2006), 145; Curtis Bradley, "The Story of *Ex Parte Milligan*: Military Trials, Enemy Combatants, and Congressional Authorization," in *Presidential Powers Stories*, ed. Christopher H. Schroeder and Curtis Bradley (New York: Foundation, 2009).

23. *Cummings v. Missouri*, 71 U.S. 277 (1867). *Milligan* was decided in April, but the Court's decision was not published until December 1866.

24. Kutler, *Judicial Power and Reconstruction Politics*, 34.

25. "The Eighth of January Celebration," *Washington National Intelligencer*, January 10, 1867.

26. James Speed to Francis Lieber, March 3, 1867, Francis Lieber Papers, Huntington Library, San Marino, California.

27. Watson's attorney had initially tried to discharge his client from prison pursuant to a writ of habeas corpus from a Virginia state court. See Fairman, *Reconstruction and Reunion*, 1:214 n. 90.

28. Ibid., 1:487–92.

29. Andrew Johnson, "Proclamation re End of Reconstruction," April 2, 1866, in *Papers of Andrew Johnson*, ed. Paul Bergeron (Knoxville: University of Tennessee Press, 1967–69), 10:352.

30. 12 Op. Att'y Gen. 69 (1866).

31. Military Reconstruction Act, 14 Stat. 428 (1867).

32. William Sharkey to Benjamin Humphreys, February 7, 1867, box 964, Governor's Papers, Benjamin Humphreys, Mississippi Department of Archives and History, Jackson.

33. William Sharkey to Benjamin Humphreys, March 14, 1867, box 965, in ibid.

34. William Sharkey to Benjamin Humphreys, March 26, 1867, in ibid.

35. *Mississippi v. Johnson*, 71 U.S. 475 (1866).

36. The Court in *Mississippi v. Johnson* also refused to entertain a prayer for relief against Johnson as a private citizen (501).

37. Brief for the Complainant on Motions, *Georgia v. Stanton*, 73 U.S. 50 (1868), in *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, ed. Philip B. Kurland and Gerhard Casper (Washington, D.C.: University Publications of America, 1975), 5:50–51.

38. *Georgia v. Stanton*, 61.

39. Foner, *Reconstruction*, xxvi.

40. Fairman, *Reconstruction and Reunion*, 1:580.

41. *Daily Cleveland Herald*, April 27, 1867, quoted in Warren, *Supreme Court in United States History*, 3:182 n. 3.

42. *New York Herald*, n.d., clipping in Charles O'Conor's case compilations, *Georgia v. Stanton*, New York Law Institute, New York.

43. William B. Napton, *The Union on Trial: The Political Journals of Judge William B. Napton* (Columbia: University of Missouri Press, 2005), 298–99.

44. *Georgia v. Stanton*, 77.

45. Gideon Welles, *Diary of Gideon Welles*, ed. Edgar T. Welles (Boston: Houghton Mifflin, 1911), 3:86.

46. *Ex Parte McCardle*, 74 U.S. 506 (1869).

47. Brief for the Appellant, *Ex Parte McCardle*, in *Landmark Briefs*, ed. Kurland and Casper, 5:160.

48. In the 1860s, the severability of statutes was no longer presumed, as it had been previously. Only if a court found that the clauses of a statute were "mutually connected with and dependent on each other" would the invalidation of one clause result in the striking of the entire statute. See *Warren v. Mayor of Charlestown*, 68 Mass. 84, 99 (1854), quoted in John Copeland Nagle, "Severability," *North Carolina Law Review* 72, no. 1 (1993–94): 203, 213. For more on severability and statutory interpretation in the nineteenth century, see Nagle, "Severability"; William Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation* (Durham: Duke University Press, 1999), chapter 3. The Military Reconstruction Act might well have been considered unseverable by a court, as the statute as a whole set up a distinctive and revolutionary form of government in the states of the former Confederacy.

49. *Ex Parte McCardle*, 514.

50. *Ex Parte Yerger*, 75 U.S. 85 (1869).

51. Ibid., 106.

52. Fairman, *Reconstruction and Reunion*, 1:584.

53. Philip Phillips to William Yerger, March 12, 1870, quoted in ibid., 1:589.

54. U.S. Constitution, Article III, Section 2. This issue had been percolating below the surface in both *Mississippi v. Johnson* and *Georgia v. Stanton*, both original suits in the Supreme Court, but both were dismissed on other grounds.

55. While the doctrine of state equality is not in the text of the Constitution (it was voted down at the convention), this principle was affirmed by the Supreme Court in *Escanaba Co. v. Chicago*, 107 U.S. 678, 689 (1883). More to the point, every state since Tennessee (1796) was admitted to the Union "on an equal footing with the original States in all respects whatever." Act for the Admission of Tennessee, chapter 47, 1 Stat. 491 (1796). See also William A. Dunning, "Are the States Equal under the Constitution?" in *Essays on the Civil War and Reconstruction* (New York: Harper and Row, 1965), 304–52.

56. The lawyers, of course, were not loathe to advance inconsistent arguments in these cases. For example, in *Texas v. White*, Phillips argued that Texas was not a state because it was entitled to no representation in Congress and was controlled by federal military authority; in *Ex Parte Yerger*, however, he was poised to contend that Mississippi was a state and could not be subject to military rule. See Brief for Defendant, White, *Texas v. White*, 74 U.S. 700 (1869), in Kurland and Casper, *Landmark Briefs*, 5:423.

57. Philip Phillips to George W. White, September 28, 1868, January 13, 1869, Philip Phillips Letterbook, 1867–69, Phillips Papers, LC. See also Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862–1890* (Cambridge: Harvard University Press, 1939), 142–44.

58. U.S. Const., Article IV, Section 4.

59. *Texas v. White*, 726.

60. Reply Brief of G. W. White, *Texas v. White*, in Kurland and Casper, *Landmark Briefs*, 5:582, 583.

61. Quoted in Walter Brown, *A Life of Albert Pike* (Fayetteville: University of Arkansas Press, 1997), 446.

62. *Congressional Globe*, 41st Cong., 2nd sess. 165–66, 209, 224 (1869). See also William Gillette, *The Right to Vote* (Baltimore: Johns Hopkins University Press, 1969), 100–105, Fairman, *Reconstruction and Reunion*, 1:586–88.

63. *Congressional Globe*, 41st Cong., 2nd sess., 164–65 (1869).

64. Ibid., 167, 169.

Homestead Exemption and Southern Legal Culture

James W. Ely Jr.

SCHOLARS HAVE LONG EXAMINED whether and to what extent southern legal culture had unique dimensions.[1] Understandably, much attention has been focused on race and caste as a dominant theme in fashioning law in the southern states.[2] Yet this emphasis may obscure another characteristic—chronic indebtedness—that profoundly shaped the evolution of legal norms in the South.[3] It is easy to forget today that until the post–World War II era, the South was a debtor region. The credit needs of an agricultural society and the capital-intensive nature of slavery fastened indebtedness on many in the region before the Civil War. Wartime destruction and the abolition of slave property further magnified the South's debtor position. Consequently, from the postrevolutionary era to the early twentieth century, sympathy for the plight of debtors strongly colored lawmaking in the southern states. Debt-relief measures found a consistently receptive climate in the region and often triggered sectional tensions. For example, during the Revolutionary War, Virginia legislators enacted laws that effectively barred the collection of debts owed to English creditors. The continued refusal of Virginia planters to pay these debts following the revolution, in violation of the Treaty of Paris, caused a major diplomatic and constitutional controversy. Similarly, the late nineteenth century saw bitter battles over the repudiation of bonded debt as southern states and cities sought to scale down their obligations and reduce interest payments. Since much of this repudiated debt was held by northern investors, the sectional implications were obvious. The widespread debt repudiation set the stage for protracted litigation.[4] Moreover, during periods of economic distress, southern lawmakers enacted a variety of stay laws to bar the collection of debts as well as measures to delay the foreclosure of mortgages.

Debtor-relief policy remained state-centered until the late nineteenth century. Although the Constitution gave Congress the authority "to establish uniform laws on the Subject of Bankruptcy throughout the United States," lawmakers did not effectively exercise this power until 1898. Over the course of the nineteenth century, Congress enacted several temporary bankruptcy measures that were soon repealed.[5] Many southern members of Congress strongly opposed the imposition of national bankruptcy norms, seeing a national system as favorable to eastern financial interests. They preferred to rely on local relief measures. As a consequence of this failure of Congress to act, the regulation of debtor-creditor relations stayed largely in state hands, and lawmakers continued the time-honored practice of passing debt-relief laws.

Still, state authority was confined by the constitutional provision that "No state shall . . . pass any . . . Law impairing the Obligation of Contracts." Under Chief Justice John Marshall, the Supreme Court fashioned the Contract Clause into a powerful bulwark against state legislative abridgement with public as well as private agreements. The Court invoked the clause to uphold land grants, tax-exemption agreements, corporate charters, and private contracts.[6] The most important of these decisions was *Sturgis v. Crowninshield* (1819), in which the Supreme Court ruled that state bankruptcy laws, as applied to debts contracted before the measures were passed, ran afoul of the Contract Clause.[7] Yet in *Sturgis*, Marshall recognized a somewhat cloudy distinction between contractual rights and the remedies available to enforce such rights. States therefore could not retroactively interfere with existing contracts but retained considerable discretion to modify the remedies for breaches of contracts as long as the changes did not materially alter the parties' ability to enforce the underlying obligation. This right-remedy distinction was a fertile source of litigation, as legislators frequently asserted that they were only modifying the remedy even if one party was seriously disadvantaged.

The Emergence of Homestead Laws

The regional receptivity to debtor relief found significant expression in the adoption of homestead exemption laws throughout the South. Such legislation should not be confused with grants of western land under the Homestead Act of 1862. That law was designed to encourage settlement of the western territories. In contrast, the homestead exemption was grounded on

the notion that a family home should be protected from creditors. Essentially American in origin, the concept of a homestead can be traced to earlier laws exempting certain chattels, such as clothing, household furniture, farm animals, and trade tools, from debt collection.[8] These laws began in the colonial era and gradually expanded to include a wide range of items.[9] Such relief was rarely controversial but could give rise to litigation over how far the immunity for "tools and implements of trade" extended.[10] In *Bronson v. Kinzie* (1843), Chief Justice Roger B. Taney observed that states may "direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments." Taney reasoned that regulations of this nature were part of the remedy and that a state could shape contractual remedies "according to its own views of policy and humanity."[11] His expansive language, much quoted by postbellum state courts, did not make clear whether the exemption of items of personal property was confined to debts incurred subsequent to passage of the law or could be applied retroactively.

There was no notion of a homestead exemption from the claims of creditors at English common law. Moreover, a 1732 act of Parliament made all types of property in the American colonies liable to satisfy debts.[12] The first law in North America to extend an exemption to the family homestead as well as to chattels was enacted in the Republic of Texas in 1839. This legislation has often been attributed to the Spanish-Mexican legal heritage of Texas, but other factors were also at work. Texas attracted a number of settlers who were hoping to escape their debts. "By the mid-1820s," legal historian Joseph W. McKnight has pointed out, "Texas had achieved the reputation as a haven for debtors."[13] This fostered a legal climate particularly sympathetic to the welfare of debtors. Against this backdrop, the financial panic of 1837 was probably a catalyst for the original 1839 homestead exemption law. Georgia and Mississippi followed suit in 1841, as did Alabama (1843) and Florida (1845) soon thereafter. The Texas Constitution of 1845 contained a homestead exemption, a step that pioneered similar provisions in other state constitutions. Over the next decade, South Carolina (1851), Tennessee (1852), Louisiana (1852), Arkansas (1852), and North Carolina (1859) enacted homestead exemption laws. Before the Civil War, then, ten of the eleven states that would comprise the Confederacy had such laws. The holdout, Virginia, did not adopt homestead legislation until 1867. Of course, homestead laws were not confined to the South. Indeed, these laws existed in virtually all states by the end

of the nineteenth century. But southern homestead laws proved especially controversial and shed light on dimensions of legal culture in the region.

The principal goal of the homestead exemption was to enhance the security of the family. Indeed, the immunity was typically extended to the "head of a family," which required courts to decide what constituted a family.[14] If there was no family, there could be no homestead. Thus, a single man with no dependents could not claim an exemption. By protecting the home from creditors, the law sought to encourage homeownership and afford families a degree of stability. The aim was to shield the debtor's family from destitution in a volatile market economy.[15] In 1867, the Supreme Court of Arkansas explained that the homestead law reflected "an enlightened public policy" that sought to secure a residence "where the family may be sheltered, and live beyond the reach of those financial misfortunes which even the most prudent and sagacious can not always avoid."[16]

The details of homestead laws were complex and varied considerably from one jurisdiction to another. In 1878, a prominent treatise writer lamented the existence of such "a discordant mass of statute law," asserting that the outcome was a bewildering and almost inexplicable system.[17] As a result, generalizations must be approached cautiously. As a broad proposition, however, homestead laws contained several common features: (1) the homestead property, as defined by state law, was exempt from most but not all debts; (2) the owner's authority to transfer or sell homestead property was curtailed by the requirement that a spouse must agree to any conveyance or sale; (3) the homestead property was protected for the surviving spouse and minor children following the owner's death, thus limiting the owner's testamentary freedom.[18]

Not all land qualified as a homestead. To gain an exemption, the land had to be occupied as a residence by the debtor. The exemption did not extend to undeveloped land on which the owner never resided.[19] In some states, the exemption was not effective until the owner made a formal declaration in the public records. More commonly, however, there was no requirement except residency, and the debtor could claim the privilege at any point before a judicial sale. Homesteads were not entirely free from the payment of debts. For example, preexisting liens and taxes, purchase money mortgages used to acquire the homestead, and mechanics' liens could be enforced against the property. Mortgages on the homestead property executed by both spouses were enforceable against the homestead. In addition, creditors could reach homestead property to the extent that it exceeded statutory limits on the exemption.[20]

A key question was the scope of the exemption. Since homestead rights were grounded on state statutes, a remarkable diversity existed among jurisdictions. The exemption was expressed in terms of monetary value or an amount of acreage. Some states differentiated between farmland and urban lots, with a much greater acreage for rural homesteads.[21] For example, the Texas Constitution of 1845 declared that a homestead consisted of two hundred acres of land in the country or a city lot not to exceed two thousand dollars in value.[22] As a general proposition, the extent of the exemption tended to be larger in the southern and western states than in the East.[23] Moreover, there was a pronounced tendency to enlarge the exemption throughout the nineteenth century. It is noteworthy that homestead laws in the antebellum southern states never applied to slave property, leaving owners free to buy or sell slaves without concern for the economic interests of the family. The extension of the homestead principle to slaves would have hampered the domestic slave trade, which was both brisk and profitable.

The concept of a protected homestead was politically attractive and rarely controversial before the Civil War. "The popularity of homestead exemption in the South," one scholar has maintained, "transcended partisan or class boundaries."[24] Further, antebellum courts pictured the exemption as a benefit to the community as well as to the individual debtor. The Texas Supreme Court declared in 1857,

> That the homestead exception was founded upon principles of the soundest policy cannot be questioned.
>
> Its design was not only to protect citizens and their Families, from the miseries and dangers of destitution, but also to cherish and support in the bosoms of individuals, those feelings of sublime independence which are so essential to the maintenance of free institutions.[25]

Reflecting widespread approval of the homestead principle, little litigation over homestead laws arose in the decades before the Civil War. Not surprisingly, courts repeatedly professed a preference for a liberal construction of homestead exemptions to effectuate the legislative purpose of safeguarding homes.[26]

The Impact of the Civil War

The South was economically devastated by the Civil War.[27] The huge loss of life and the physical destruction occasioned by the conflict, coupled with

the abolition of slave property and the unsettling transformation of labor relations, contributed to the general economic distress. Property values plummeted. "The destruction wrought by war and the sudden act of emancipation," Morton Keller has observed, "had catastrophic effects on southern property values."[28] The transportation system was near collapse. Individuals from every walk of life found themselves with mountainous debts. "The whole South is now bankrupt," a planter's wife complained.[29] One historian has pointed out that the "insuperable problem of the indebtedness of the people was the most vexatious issue" confronting Mississippi in the immediate aftermath of the Civil War.[30] In response to these dire conditions, southern lawmakers adopted a fresh round of measures to stay the collection of debts, delay foreclosures, and facilitate the redemption of land from tax delinquency sales. Many states also enlarged the exemption of personal property from the reach of creditors.[31] The southern states "were distinctly debtor states," a commentator stated, "and their laws were distinctly debtors' laws."[32] Renewed interest in the homestead exemption was an integral part of this postbellum program to protect landowners, both planters and yeoman farmers, from losing their property. "In the 1860s, in the aftermath of the Civil War," one scholar has noted, the "homestead exemption found new constituents and fresh saliency in the reconstruction of a prostrate South."[33]

The postbellum drive for homestead laws had a racial dimension. In practice, the homestead exemptions clearly protected the landed interests of white owners from creditors. Few blacks owned land and thus derived any benefit from the immunity. Moreover, by keeping land off the market, the homestead exemptions made it difficult for the handful of blacks with capital to find land to purchase.[34]

Southern states took a number of steps to strengthen homestead protection. First, during the Reconstruction era, most states, including Alabama, Arkansas, Florida, Georgia, North Carolina, and South Carolina, placed (often detailed) homestead provisions in their constitutions. Moreover, Virginia, which had no homestead law until 1867, added a homestead requirement in its 1869 constitution. Lawmakers clearly were no longer content to rely on a purely statutory basis for this immunity. By elevating homestead to constitutional status, they may well have intended to signal that such immunity was a permanent aspect of state policy and was not a temporary expedient dependent on legislative whim.

Second, legislators greatly enlarged the extent of the homestead exemption. Georgia, for example, increased the size of the prewar exemption ten-

fold. "The legislatures of most of the Southern States," a Georgia lawyer lamented in 1871, "have exercised uncontrollable discretion in passing Homestead and Exemption Laws (which they claim relate only to the remedy), regardless of the effect on the rights of creditors." He charged that "in most of the Southern States the homesteads and exemptions are so exorbitant and extravagant, that there are but few cases in which any property of the debtor is left, out of which creditors can procure their money."[35] These generous exemptions benefited both planters and yeoman farmers, who shared a common interest in preserving their land. Third, in several states, the homestead exemption, either by express statutory terms or by judicial construction, was applied to debts contracted before as well as after adoption of the statute or constitutional provision. This set the stage for a protracted controversy.

Retroactive application of homestead exemptions was not uniform throughout the region. The Tennessee homestead law of 1852, for example, provided that a family residence was exempt from execution in all cases where the contract was made after January 1853. This pattern continued following the Civil War. An 1868 act enlarging the homestead exemption did not apply "to contracts entered into before its passage."[36] The homestead language in the 1870 Constitution and the implementing statute was unclear with respect to antecedent debts, but as discussed below, the Tennessee Supreme Court ruled that the immunity could not apply to debts contracted before the effective date of the these measures. As a result, Tennessee largely escaped the bitter controversy over prior debts.

The liberalized homestead laws in the postbellum southern states sparked a sharp increase in lawsuits over homesteads. According to one historian, "It is hardly surprising that homestead exemption statutes were such an intensely litigated fixture of the postbellum legal landscape."[37] Outraged that security on which they had counted was being eliminated, creditors took particular aim at the extension of homestead protection to antecedent debts. They mounted a series of constitutional challenges, arguing that retroactive application of the enlarged homestead exemptions amounted to an impairment of their contracts in violation of the Contract Clause.

The Judicial Response

Southern courts were generally sympathetic to the legislative purpose behind the enlarged homestead exemptions. They tended to reject the Contract Clause argument and to sustain the application of homestead laws to

antecedent debts. In so doing, southern judges gave considerable weight to the depressed economic circumstances following the Civil War. In 1869, Chief Judge Joseph E. Brown of Georgia stressed "the general wreck of fortunes and destruction of rights, caused by the war" and pictured homestead laws "as a means of equalizing losses to some extent, and of retaining and inviting population, by securing to each family a home, free of old liens." He insisted that "the homestead measure was a necessity, and its adoption was dictated by sound public policy, to save a large class of intelligent, patriotic citizens and their families from despondency."[38] In the same vein, a Virginia attorney, arguing in favor of the validity of that state's homestead law in 1872, declared, "Since the war, another large class of the debtors of the State have become insolvent, or nearly so. These are the farmers and planters of the State." He explained that "the war having swept off their slaves and nearly all their personal property, leaving them with little less their lands, these lands are insufficient to pay their debts."[39]

In addition to this emphasis on the economic plight of the South as a justification for retroactive application of homestead laws, courts frequently likened protection of homes to long-standing exemptions of items of personal property. They contended that both federal and state courts had sustained statutes granting immunity for the debtor's property necessary for subsistence or for carrying on an occupation to antecedent debts. "Is not land in a country where nearly all are farmers," the Supreme Court of Georgia asked, "as much a necessity as the tools of a trade?"[40] Likewise, the Supreme Court of North Carolina declared in 1869, "If the Legislature can exempt personal property, it is not pretended that it may not in like manner exempt real property—a homestead."[41]

Further, some courts insisted that the homestead law simply amounted to a modification of the remedy to enforce contracts and was thus well within the scope of state legislative authority. The exemption of real and personal property from levy, it was maintained, did not impair the contract but merely provided relief to an impoverished populace. The Supreme Court of Georgia, for example, concluded that the state constitution providing for a homestead "is only a regulation of the remedy, and is not an impairing of any right, express or implied, secured to creditors then existing by their ordinary contracts."[42] Judicial opinions upholding the application of homestead exemptions to antecedent debts invariably relied on Taney's dictum that a state could adopt remedies based on "its own views of policy and humanity."[43] Southern jurists could also find support for this position from promi-

nent constitutional scholar Thomas M. Cooley. In an influential 1868 treatise, Cooley asserted, "Nor is there any constitutional objection to those laws which exempt certain portions of a debtor's property from execution being so modified as to increase the exemptions, and the modifications made applicable to contracts previously entered into."[44] Thus, the Supreme Court of North Carolina declared in 1873 that the state's homestead laws were based on "'policy and humanity'; and they do not impair, but are paramount to debts." It poignantly added, "If under our circumstances our people are to be left without any exemptions, the policy of a christian civilization is lost sight of, and we might almost as well return to the inhumanity of the Twelve Tables of the Roman law."[45]

To buttress the contention that exemptions pertained solely to the remedy, as distinct from rights under the contract itself, a number of southern courts compared homestead laws to the abolition of imprisonment for debt.[46] The movement to end confinement for unpaid debts was a major reform of the mid-nineteenth century. Although this dramatic change in the law eliminated a potentially efficacious remedy available to creditors, the Supreme Court had sustained it with respect to a contract made before the abolition was adopted. The Court reasoned that liberating debtors from prison only acted on part of the remedies available and was a matter for state policy.[47] Remedies against the debtor's property remained in full force. Southern courts maintained that if states could abolish imprisonment for debt without violating the Contract Clause, then surely they could make homestead exemptions apply to preexisting contracts.

The prevailing view among southern jurists was clearly to treat homestead and exemption laws favorably. To be sure, the courts occasionally extolled the sanctity of contracts as the foundation of economic growth, but they then shifted gears to assert that the retroactive homestead laws did not impair contracts.[48] A contemporary critic of such measures aptly observed in 1871, "As the law now stands in most of the Southern States, no debts, whether simple debts or judgments, which were in existence before the passage of these laws, can be enforced—the courts of nearly all the states asserting that these laws are constitutional and apply to debts contracted before, as well as those contracted after their adoption."[49]

Not all southern judges, of course, spoke with the same voice. Some maintained that application of homestead exemptions to antecedent debts unconstitutionally despoiled the contractual rights of creditors and encouraged fraud. In an 1869 dissenting opinion, Judge Hiram Warner of Georgia

insisted that Chief Justice Taney's remarks about state exemption laws pertained only to future contracts. Warner declared that the homestead exemption, as applied to contracts made prior to its adoption, was an interference with agreements in violation of the Contract Clause. Nor was Warner impressed with the emphasis on economic hardship emanating from the Civil War. Pointing out that creditors as well as debtors had suffered from the calamities of war, he stressed that the Framers of the Constitution had just emerged from a long war and "well knew the evils which resulted therefrom, and the general demoralization of society, in regard to performing their contracts."[50] In a dissent from the same year, Chief Judge Richmond M. Pearson similarly found application of North Carolina's homestead law to preexisting contracts to destroy the obligation of contract. He claimed that the homestead provisions had the effect of exempting all property of debtors in nine of ten cases, thus robbing the creditor of any means of enforcing the contract. Pearson lamented that with the homestead laws, the legislature was promoting "a progress . . . of dishonesty and fraud."[51]

In addition to these scattered dissents, in *The Homestead Cases* (1872) the Supreme Court of Appeals of Virginia invalidated a homestead measure applicable to prior debts.[52] It was the only southern high court to do so in advance of decisions by the U.S. Supreme Court. At issue was the homestead provision of the 1869 Virginia Constitution and the 1870 statute enacted to implement that provision. In striking down these measures, the court addressed a number of issues that warrant investigation. It sharply questioned the distinction between laws that abridged contractual rights and those that purported to operate only on the remedy. Any law, the court maintained, that takes away a remedy that a creditor had when the contract was entered into amounted to an impairment of the contract, in direct violation of the Constitution. In this connection, the Virginia court dismissed Chief Justice Taney's dictum, on which other southern courts had heavily relied. The Virginia court argued that Taney's remarks had been taken out of context and that Taney in fact held that alteration of remedy could impair contracts. The court pointed out that the Virginia legislature had previously always adopted exemption laws prospectively. If the legislature had sole discretion over the amount of homestead exemptions, the court continued, then the legislature would be empowered to wipe out every debt by withdrawing property from levy. The purpose of the Contract Clause, the court stressed, was not "to protect a mere barren and abstract right" but to maintain the integrity of contracts throughout the United States.[53]

Turning to the practical result of the Virginia homestead law, the court worried that the law would exempt the property of 90 percent of debtors in the state from the reach of creditors. The measure would in effect cancel their obligations. Indeed, the court speculated that potential homestead exemptions exceeded the value of all the real property in the state and asserted that such figures amounted "to *absolute repudiation*." Nor was the court impressed with the arguments of counsel that sought to array debtors against creditors. Rejecting any class distinctions among citizens of the state, the court lectured, "But the truth is, there is no such thing as a 'debtor class and a creditor class' among the people of the State. . . . In the great majority of cases, every man is both a creditor and a debtor."[54] The court concluded by recognizing the financial hardships that many were suffering. It insisted, however, that this was no reason to disregard obligations: "The inviolability of contracts, public and private, is the foundation of all social progress, and the corner-stone of all forms of civilized society."[55]

A few months later, the Supreme Court of Tennessee reached a similar result. At issue in *Hannum v. McInturf* (1872) was the homestead language of the 1870 state constitution and the implementing legislation. Writing for a unanimous court, Justice Thomas J. Freeman dismissed the Taney remarks in *Bronson* as pure dictum that in any event did not mention homestead exemptions. "If property one hundred dollars in value may be exempted," he asked, "why not one thousand, and then ten thousand dollars worth? It is not the extent to which the obligation is impaired in dollars that is prohibited by the Constitution, but it imperatively forbids that it shall be impaired at all."[56] Freeman concluded that the homestead provisions should be construed as operating prospectively and as not conferring any exemption for debts contracted before their adoption.

Although the Virginia and Tennessee Supreme Courts were out of step with their regional counterparts, their reasoning anticipated the reaction of the U.S. Supreme Court to the homestead controversy. In *Gunn v. Barry* (1873), the Court, in a unanimous opinion by Justice Noah Swayne, struck down Georgia's constitutional provision on homesteads insofar as it applied to antecedent debts.

Noting "the greatly increased magnitude" of the exemptions in the state constitution over prior law, Swayne reasoned that the measure "does not merely impair, it annihilates the remedy. There is none left."[57] He ruled that remedies for the enforcement of contracts existing at the time that the agreement was made were part of the obligation and that a state could alter

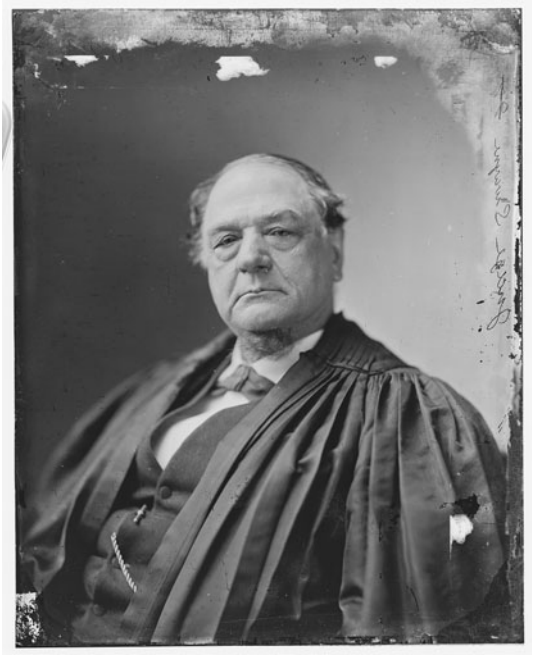

FIGURE 10. Justice Noah Swayne authored two Supreme Court decisions invalidating the retroactive application of homestead exemptions as a violation of the U.S. Constitution's Contract Clause. Courtesy of Library of Congress.

them only if there was no impairment of a substantive right. It followed that the Georgia Constitution impaired the obligation of prior contracts and violated the Contract Clause.

In the wake of *Gunn*, southern courts had to choose between acquiescence to that ruling and adherence to their state's homestead exemption by seeking to distinguish the invalid Georgia law from that of other states. Most opted for the former course.[58] In the leading case of *Lessley v. Phipps* (1874), the Supreme Court of Mississippi considered the retroactive application of the state's 1865 statute that greatly enlarged the exemption for both personal property and homesteads.[59] With respect to these generous immunities, one observer declared, "It will readily be seen that the collection of any debts whatever is almost entirely prevented."[60] Perhaps with the troubled economic conditions of the state in mind, the court pictured the Contract Clause as "founded on the motive of shielding the people in their persons and property from the effect of legislation arising in passion and impulse, caused by unusual emergencies, to which communities, like individuals, are exposed."[61] Reversing an earlier decision, it ruled that creditors must be able to look to the law at the point when the contract is made and that a subsequent law that removed much of the debtor's property from the reach of

creditors was void as to prior debts. Treating *Gunn* as conclusive authority, the Mississippi court evaded a declaration of unconstitutionality by finding that the increased homestead provisions in the 1865 act were prospective and applied only to subsequently acquired liabilities. Concluding on an instrumental note, the court expressed confidence that its decision would promote the public good. "The principle vindicated," it reasoned, "will give stability and uniformity to the business and industries of the people."[62]

In contrast, in 1873 the Supreme Court of North Carolina resolutely asserted that the state's homestead provision was unlike the invalid Georgia measure and that the *Gunn* decision did not govern.[63] The court advanced two arguments. First, it stressed that the Georgia law purported to divest a judgment creditor of a lien secured before the date of the homestead measure, whereas the North Carolina law did not operate against a prior lien. Second, it declared that the 1868 North Carolina Constitution actually reduced the amount of homestead exemption formerly available. In this regard, the court appears to have reasoned that the magnitude of the exemption rather than its retroactive application was the decisive factor in *Gunn*.

A few years later, a similar ruling by the North Carolina Supreme Court was carried to the Supreme Court on a writ of error.[64] In *Edwards v. Kearzey* (1878) that tribunal reversed the state court decision in another opinion by Justice Swayne. Stressing that the obligation of a contract included the means of enforcement, he likened the homestead exemption to stay laws that postponed the time of payment under a contract. Swayne pointed out that stay laws were generally seen as an unconstitutional impairment of contracts, intoning, "No community can have any higher public interest than in the faithful performance of contracts and the honest administration of justice."[65] Swayne appeared to hold that any subsequent law that so affected the remedy as to lessen the value of a contract was barred by the Constitution. This requirement would seemingly rule out any exemption by state law made after the parties entered a contract. Such a construction bothered two justices, who concurred in the conclusion that the North Carolina homestead provision was invalid but argued that not every subsequent exemption was necessarily void. They saw room for "humane legislation" that exempted necessary items of personal property and explained that the amount of the North Carolina homestead exemption was excessive.

Certainly by 1878, if not before, it was evident that outside of bankruptcy, the application of homestead exemptions to antecedent debts was void. So what did southern legislators and judges achieve by enacting and upholding

these Reconstruction-era laws? The answer is that they gained partial success. The homestead laws extended protection to landowners for the limited time between passage and later nullification by the Supreme Court. As historian Charles Warren has cogently observed, the homestead laws, even if eventually overturned, "largely achieved their purpose of giving temporary protection to the debtor and the conservation of his property from forced sales, during the interval between the enactment of the law and its invalidation by the Court."[66] Even interim relief gave southern landowners an opportunity to regain their economic footing. Since the laws reflected the prevailing popular sentiment to preserve existing property from creditor seizure for as long as possible, there was no political downside to passing homestead legislation. Creditors, conversely, found the experience frustrating. Despite their eventual victory in the Supreme Court, creditors in practice received only belated and inadequate protection for their interests. Accordingly, they pushed for a bankruptcy system that established national norms for the recovery of debts.

Bankruptcy

With the second decision by the Supreme Court in 1873, the question of application of homestead exemptions by the states to debts contracted prior to passage of such laws was put to rest as a constitutional matter. But this picture was complicated by the emergence of bankruptcy laws. In 1867, Congress narrowly passed another short-lived bankruptcy measure. "The chief pressure for the bill," Warren explains, "came from Northern creditors of Southern debtors, who saw in it their only chance of getting any pay from these debtors, as the latter owned only landed property, and having control of Southern Legislatures and Courts were procuring stay-and-exemption-laws, unconstitutionally applicable to prior debts."[67] To placate debtors, the proponents of the law agreed to adopt state exemptions of real property from the reach of creditors. This was the first bankruptcy law to recognize state homestead exemptions. In addition to a minimal federal exemption, the 1867 act provided that property would be exempt from levy "to an amount not exceeding that allowed by such State exemption laws" as they existed in 1864.[68] To further mitigate the situation of debtors, Congress enacted an 1872 amendment that allowed an exemption to the amount under state law available in 1871.[69] By this time, of course, many southern states had greatly increased the exemptions. Later that year, the Virginia Supreme Court of

Appeals found that the state's homestead laws violated the Contract Clause as applied to debts incurred before such legislation was enacted. This ruling threatened to undercut Congress's purpose in adopting homestead exemptions effective in 1871. A year later, Congress amended the act to declare that such exemptions allowed to bankrupts were valid against debts contracted before the state laws were enacted as well as those contracted afterward, "any decision of any such [state] court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."[70] The Contract Clause did not bind Congress, so under its bankruptcy power, Congress could retroactively impair existing contracts.

Nonetheless, questions were raised concerning the Congress's constitutional authority to enact a law that in effect overturned a state court decision concerning a state homestead law. Federal circuit courts were split on the validity of the 1873 amendment, and the matter never reached the U.S. Supreme Court.[71] Beyond legal challenges, the 1871 and 1873 amendments obviously weakened the prospects for debt recovery. Not surprisingly, creditors were dismayed by the exemption provisions and became increasingly critical of the legislation.[72] In fact, much of the call for repeal of the law came from disappointed creditors.

The 1867 act incorporated into bankruptcy administration the different exemption policies of the various states. The amount of property exemptions would therefore vary widely from jurisdiction to jurisdiction. Since the Constitution authorized Congress to enact "uniform laws on the subject of bankruptcies through the United States," the act was challenged on grounds that it lacked uniformity. Supporters of the bankruptcy act maintained that the constitutional requirement of uniformity simply meant that the law must operate on states equally and did not require that same outcome in each jurisdiction. The lower federal circuit courts upheld the measure on grounds that it was uniform,[73] but the issue did not reach the Supreme Court before the act was repealed in 1878. With repeal, the state debt relief systems were once again in force.

Twenty years passed before Congress returned to the question of bankruptcy. Spurred by the Depression of 1893, Congress, again over the objection of many southern lawmakers, enacted the Bankruptcy Act of 1898. Although not apparent at the time, this measure established the first permanent bankruptcy system. The product of numerous compromises, the act left in place state exemptions when a debtor filed a petition in bankruptcy.

The Supreme Court affirmed the constitutionality of the 1898 act against

a variety of challenges in *Hanover National Bank v. Moyses* (1902).[74] Writing for a unanimous court, Chief Justice Melville W. Fuller stressed two points of particular relevance for this study. First, he upheld the power of Congress to authorize the retroactive impairment of contracts. "The subject of 'bankruptcies,'" Fuller wrote, "includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do." Second, he ruled that the uniformity requirement of the Bankruptcy Clause was "geographic and not personal."[75] Therefore Congress could incorporate the homestead exemptions as determined by state law, notwithstanding the fact that debtors could claim different exemptions in different jurisdictions. In other words, states retained broad discretion to set the amount of exemptions in bankruptcy.

Rethinking Homestead Laws

In the late nineteenth and early twentieth centuries, commentators and courts continued to extol the virtues of homestead laws. A treatise writer in 1893 proclaimed that "home conservation now appears to me as one of the greatest advances in civilization during the present century. It ought to have recognition, in some appropriate way, this year at the World's Columbian Fair."[76] As late as 1928, the Supreme Court of North Carolina waxed sentimental in deciding a homestead claim, declaring "that every safeguard is given the homesteader and courts have carefully protected his rights as guaranteed by the Constitution. The law favors the homestead." To underscore this point, the court quoted the entire first verse of the poem "Home, Sweet Home."[77] Moreover, southern courts heard a steady stream of cases dealing with disputed homestead claims and the rights of surviving spouses and children.

But flowery rhetoric and lawsuits regarding issues of statutory construction should not obscure the larger picture. In a number of states, legislators began to rethink the wisdom of homestead protection and to trim the amount of the exemption. In the 1870s, Alabama, Arkansas, and Mississippi substantially reduced the exemption. The most revealing struggle took place in Georgia. At the 1877 state constitutional convention, there were calls for the outright abolition of homestead law. The convention would not go this far but did cut the exemption and allowed debtors to waive homestead protection. Put to a separate referendum, the revamped homestead law carried

by a wide margin.[78] The Alabama Constitution of 1875 also permitted the right of homestead exemption to be waived by a written instrument. Waiver, of course, tended to undermine the protective feature of the law. Merchants could require homeowners to waive exemption as a condition precedent to securing credit. Accordingly, southern courts tended to rule that absent a constitutional provision, agreements to waive the homestead exemption were void as in contravention of state policy.[79]

Other states pursued a less dramatic course that pointed in the same direction. Homestead laws often were not subject to periodic review, so the value limits remained untouched for decades. Such provisions inevitably became obsolete.[80] For example, the Tennessee Constitution of 1870 fixed an exemption value of one thousand dollars. The state legislature did not revisit the exemption amount until 1931, by which time the exemption was plainly inadequate to protect even a modest home. In 1931, the exemption was increased to two thousand dollars, still offering scant protection. Two years later, lawmakers returned the amount to one thousand dollars. One might well ponder what purpose was served by such a transparently insufficient value assigned to a homestead. It seems to be an archaic survival of a policy no longer in favor.[81]

What accounts for this change of heart? Why would many southerners who only a few years earlier had demanded generous protection against creditors now move to curtail homesteads? Despite the widespread popularity of enlarged homestead provisions following the Civil War, there had always been an undercurrent of opposition. Critics not only argued that the retroactive application of exemptions unconstitutionally impaired contracts but also pointed to practical concerns. They stressed the pressing need for credit and investment capital to revitalize the southern economy. In this context, homestead exemptions, when coupled with laws suspending the collection of debts and state repudiation of bonded debts, were seen as destroying the South's reputation as a reliable place to invest.[82] As economic recovery gradually spread across the region, commercial interests sharpened their attack on debt-relief measures. Homestead exemptions were caught up in the debate over policies designed to promote what became known as the New South. Advocates for the New South wished to move away from the agrarian past and saw manufacturing as the path to future prosperity for the region.[83] They hoped to forge alliances with northern investors and attract outside capital.[84] In this light, homestead laws, which seemingly secured most real property from the claims of creditors, were increasingly viewed not as a boon to land-

owners but as an impediment to economic revival. This emerging ethos fostered a political climate favorable to modifying the homestead laws.

In the heated debates over homestead exemptions, creditors were often depicted as unfeeling and rapacious, prepared to squeeze honest debtors who had fallen on hard times. As the appeal of homesteads began to fade in the late nineteenth century, however, occasional voices expressed sympathy for the position of creditors. As early as 1872, the Supreme Judicial Court of Virginia had suggested that the line between creditors and debtors was indistinct and shifting. A year later, the Florida Supreme Court, upholding a mortgage foreclosure despite a homestead claim, stressed the need for credit as a means to escape poverty. The court observed that if it failed to enforce the mortgage "policy and humanity might well cry out in behalf of the lender and in behalf of *his* wife and children, who are thus impoverished and brought to want."[85] Similarly, the Supreme Court of Tennessee remarked in 1890, "The creditor is not to be treated as a hostile enemy who is robbing him. He too may want a home and often would have had one could he have received his due. He may have a wife and children likewise in need. He but demands a fair show before the law to collect his debt . . . but no sentiment is wasted on him."[86]

Prodded by the U.S. Supreme Court and influenced by changed attitudes toward credit relationships, many southern states had overhauled the size of their homestead exemptions by 1900. Although the South for decades remained an economically distressed region, the movement was toward gradual convergence with national legal norms and integration into national markets. Southern homestead laws, with some exceptions, became less unique and no longer stood out from their counterparts elsewhere in the United States.[87]

Homestead Laws and Southern Legal Culture

The southern experience with homestead exemptions informs our understanding of the legal culture of the region in several areas. First, the record makes clear that southern lawmakers were guided less by ideology than by the perceived needs of the moment. Hence, they emphasized practicality and expediency. No one better exemplified this tendency to shift attitudes regarding homesteads in line with evolving economic circumstances than Joseph E. Brown. As chief justice of the Georgia Supreme Court, he

authored an 1869 opinion that lavishly praised homestead exemptions and even endorsed their application to antecedent debts. By the time of the state constitutional convention of 1877, however, Brown had become a proponent of New South economic policies and led the successful drive to scale back homesteads. This reconsideration of the role of homestead laws by southern lawmakers lends support to legal historian Lawrence M. Friedman's contention that "law is a mirror of society. . . . Law is the product of social forces, working in society."[88]

Second, the adoption of homestead exemptions worked at cross-purposes with a central theme of American land law. Even before the revolution, land law was being revamped to encourage freedom of alienation. Land was increasingly treated as a commodity to be bought and sold on an open market. Legal doctrines that stood in the way of this goal were dumped. Thus, primogeniture and entail, which sought to tie up property along family lines, were abolished soon after the break with Great Britain. The transfer of property was greatly simplified.[89] The married women's common law disability to own and manage landed property was an anomaly in a society that encouraged broad property ownership. In the mid-nineteenth century, the passage of married women's property acts, which allowed wives to own land as their separate estates free from their husbands' control, facilitated the entry of women into the market. All of these legal changes made land readily marketable. The result was land speculation and a robust real estate market. "People played the land market," Friedman points out, "the way their descendants played the stock market."[90]

Yet the homestead exemption appeared to contradict this central premise that land should be alienable. In 1893, a treatise writer noted the potential conflict between individual economic rights and legislation safeguarding the family home from market forces. He acknowledged that the protection of homesteads "has been done somewhat at the expense of individualism and the personal liberty of contract."[91] Nowhere was this tension more apparent than in the nineteenth-century South. The sometimes bitter debate over homestead laws laid bare many southerners' ambivalence toward the place of residences in the market economy. From the outset, homestead laws reflected a hesitation to accept full absorption into the market, a reluctance heightened by the Civil War. Although such concern was certainly manifested elsewhere in the United States, notably in the western states, it had particular force in the South, with its traditional economy of planta-

tions and yeoman farmers. As historian Peter J. Coleman explains, "In the South at least, the homestead laws . . . can be seen as a last-ditch effort to prevent the ultimate commercialization of life."[92]

Exceptions to the Trend: Texas and Florida

As homestead exemptions were being scaled back or simply allowed to atrophy in most southern states, two states conspicuously resisted this trend and retained generous homestead provisions. Even today, in both Texas and Florida, the exemption is defined solely in terms of acreage, with no maximum monetary amount. The size of the homestead parcel differs for urban and rural land but is otherwise unlimited. By the mid-twentieth century, these states had a deserved reputation as debtor-friendly havens. Their exemption policies harked back to the nineteenth-century roots of homestead.

It is not easy to account for this unique dedication to the homestead exemption, but Florida's experience may be instructive. Florida first adopted a homestead law in 1845. The homestead principle was elevated to constitutional status in 1868 and was carried forward with similar language in the 1885 and 1968 constitutions.[93] In the aftermath of the Civil War, the Florida Supreme Court viewed this provision in terms of the widespread destitution in the state and the need to protect families from ruin.[94] An unarticulated policy, however, was likely the desire to attract settlers to a state that was impoverished, thinly populated, and economically undeveloped.[95] During the late nineteenth century, for example, Florida had no major cities. Given this background, the Florida Supreme Court consistently ruled that the homestead provision should be liberally construed.[96]

By the post–World War II era, of course, Florida's economic circumstances had changed dramatically. The homestead law was subject to criticism as antiquated, a barrier to the alienation of land, and unduly generous to debtors.[97] The unlimited extent of the exemption clearly went well beyond furnishing minimal support for debtors and their families. Yet calls for revision have fallen on deaf ears. The Florida homestead exemption appears to have taken on a life of its own. An appellate court may have best articulated the prevailing attitude when it explained that in Florida, "Homesteads are 'sacred cows.'"[98]

Over time, these open-ended homestead provisions in Florida and Texas gave rise to controversy, particularly in bankruptcy proceedings. Perceived abuses of homesteads' protection in bankruptcy caused Congress to revisit

the matter. Florida's homestead law has received the most national attention and adverse publicity. A number of defrauding business executives and indebted celebrities moved to Florida and promptly used their assets to purchase a residence claimed as a homestead, thereby hindering any recovery by their creditors. In 2001, the Florida Supreme Court, although indicating unhappiness with the thought that homesteads were purchased with the intent to defraud, ruled that the acquisition of the homestead property with the specific intent to shield assets from creditors was not conduct sufficient to forfeit the exemption. The court expressed reluctance to reach beyond the literal language of the Florida Constitution and fashion additional exceptions to homestead protection.[99] The situation in Florida brought the esoteric topic of homestead laws to national attention.

In 2005, Congress imposed limitations on state homestead laws as part of the Bankruptcy Abuse Prevention and Consumer Protection Act. The act bars debtors from claiming a homestead that exceeds $125,000 unless the debtor has occupied the residence for at least 1,215 days (3.3 years) before a bankruptcy filing. The debtor's interest that exceeds $125,000 is not exempt from the claims of creditors. Moreover, the act prohibits debtors with certain felony convictions, such as violations of state or federal securities laws, from exempting any interest beyond $125,000. The act was clearly aimed at nonresident debtors who flee into Florida and purchase a residence to frustrate their creditors. Conversely, long-term residents of Florida who occupy homesteads can continue to take advantage of the state's liberal policy. Thus, Congress sought to strike a balance between Florida's treatment of its residents and the need to prevent flagrant abuse of the bankruptcy system by defaulting parties.

Florida and Texas retained an open-ended conception of the homestead exemption that most southern states gradually abandoned. Eventually, however, they were so out of step with national norms that Congress felt compelled to rein in the abusive potential of such measures.

Homesteads and Southern Distinctiveness

The evolution of homestead exemption laws in the South casts light on the continuing debate over the distinctiveness of southern law. The dispute over generous homestead immunities was tied to the larger debate over debtor-creditor relations and the emergence of national bankruptcy law. Defeat in the Civil War exacerbated the South's long-standing position as a debtor

region. The persistent preference for the interests of debtors over those of creditors demonstrated that southern lawmakers were more concerned with protecting landed wealth than with embracing a credit economy or fostering economic growth. In the nineteenth century, southern states stood out both in their rapid adoption of the homestead concept and in the aggressive use of the homestead exemption following the Civil War. But the pull of national economic forces, coupled with decisions by the Supreme Court, were too strong to resist. By the end of the nineteenth century, the homestead laws in the region gradually converged with such provisions elsewhere in the nation, and thus southern exemptions, aside from Florida and Texas, were less unique.

Perhaps the lesson is clear. As southern culture and economics were increasingly integrated into the national unit, regional variations in the legal order were diluted. This process in turn suggests that any distinctiveness of southern law is more a matter of timing and style than a question of fundamental differences. The South, for all the unique features of its legal culture, was ultimately within the main currents of American legal history.

NOTES

1. See David J. Bodenhamer and James W. Ely Jr., eds., *Ambivalent Legacy: A Legal History of the South* (Jackson: University of Mississippi Press, 1984); Kermit L. Hall and James W. Ely Jr., eds., *An Uncertain Tradition: Constitutionalism and the History of the South* (Athens: University of Georgia Press, 1989).

2. Paul Finkelman, "Exploring Southern Legal History," *North Carolina Law Review* 64, no. 1 (1985): 88–101.

3. James W. Ely Jr. and David J. Bodenhamer, "Regionalism and American Legal History: The Southern Experience," *Vanderbilt Law Review* 39, no. 3 (1986): 551–52. See also William M. Wiecek, "'Old Times There Are Not Forgotten': The Distinctiveness of the Southern Constitutional Experience," in *Uncertain Tradition*, ed. Hall and Ely, 183.

4. See generally John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* (New York: Oxford University Press, 1987), 58–120; Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge: Harvard University Press, 1977), 231–32.

5. For a discussion of the 1800 and 1841 bankruptcy laws, see Edward J. Balleisen, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America* (Chapel Hill: University of North Carolina Press, 2001), 101–33.

6. James W. Ely Jr., "The Marshall Court and Property Rights: A Reappraisal," *John Marshall Law Review* 33, no. 4 (2000): 1023, 1029–47.

7. *Sturgis v. Crowninshield*, 17 U.S. 122 (1819).

8. "Note: State Homestead Exemption Laws," *Yale Law Review* 46, no. 6 (1937): 1023, 1024. ("The earlier laws dealing with chattel exemptions appear to be the true forerunner of homestead legislation.")

9. See Steven Hahn, *The Roots of Southern Populism: Yeoman Farmers and the Transformation of the Georgia Upcountry, 1850–1890* (New York: Oxford University Press, 1983), 75 (noting the steady growth in antebellum Georgia of personal property exempt from levy by creditors).

10. See, for example, *Sallee v. Waters*, 17 Ala. 482 (1850) (concluding that the printing press was an implement of trade but that ink and paper were not covered by the exemption statute).

11. *Bronson v. Kinzie*, 42 U.S. 311 (1843).

12. Claire Priest, "Creating an American Property Law: Alienability and Its Limits in American History," *Harvard Law Review* 120, no. 2 (2006): 423–24.

13. Joseph W. McKnight, "Protection of the Family Home from Seizure by Creditors: The Sources and Evolution of a Legal Principle," *Southwestern Historical Quarterly* 86, no. 3 (1983): 375.

14. Seymour D. Thompson, *A Treatise on Homestead and Exemption Laws* (St. Louis: Thomas, 1878), 39–62.

15. "Note: State Homestead Exemption Laws," 1030.

16. *Wassell v. Tunnah*, 25 Ark. 101, 103.

17. Seymour D. Thompson, *Treatise*, vi.

18. George L. Haskins, "Homestead Exemptions," *Harvard Law Review* 63, no. 8 (1950): 1290.

19. *Franklin v. Coffee*, 18 Texas 413 (1857).

20. Ibid., 1294–1306.

21. Paul Goodman, "The Emergence of the Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880," *Journal of American History* 80, no. 2 (1993): 471–72, especially table 1.

22. "Note: The Homestead Provisions in the Texas Constitution," *Texas Law Review* 3, no. 3 (1925): 220 n. 13.

23. Stanley Folz, "Exemption Laws and Public Policy," *American Law Register* 53, no. 1 (1905): 728.

24. Alison D. Morantz, "There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America," *Law and History Review* 24, no. 2 (2006): 245, 253.

25. *Franklin v. Coffee*, 416.

26. Seymour D. Thompson, *Treatise*, 5–6.

27. R. H. Woody, "Some Aspects of the Economic Condition of South Carolina after the Civil War," *North Carolina Historical Review* 7, no. 3 (1930): 346–64.

28. Keller, *Affairs of State*, 199. See also Elizabeth Lee Thompson, *The Reconstruction of Southern Debtors: Bankruptcy after the Civil War* (Athens: University of Georgia Press, 2004), 26 (noting "a marked decrease" in the value of southern farms after the Civil War).

29. As quoted in Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Perennial Classics, 2002), 326.

30. William C. Harris, *Presidential Reconstruction in Mississippi* (Baton Rouge: Louisiana State University Press, 1967), 174.

31. Elizabeth Lee Thompson, *Reconstruction of Southern Debtors*, 26. ("A vast array of personal property was also exempt, particularly types of property that would benefit farmers or professionals.")

32. Folz, "Exemption Laws," 728.

33. Goodman, "Emergence," 491.

34. Michael Perman, *The Road to Redemption: Southern Politics, 1869–1879* (Chapel Hill: University of North Carolina Press, 1984), 31–32; Goodman, "Emergence," 492–93.

35. Henry W. Farnham, *Chapters in the History of Social Legislation in the United States to 1860* (Washington, D.C.: Carnegie Institution, 1938), 150–51; J. H. Thomas, "Homestead and Exemption Laws of the Southern States, II," *American Law Register* 19, no. 3 (1871): 149.

36. Thomas, "Homestead and Exemption Laws II," 149.

37. Morantz, "There's No Place Like Home," 248.

38. *Hardeman v. Downer*, 39 Ga. 425, 440 (1869) (Brown, C.J., concurring). Brown had a long and colorful career in Georgia political life. He was the Civil War governor of that state and served as chief justice of the Georgia Supreme Court from July 1868 to December 1870. See Joseph H. Parks, *Joseph E. Brown of Georgia* (Baton Rouge: Louisiana State University Press, 1977).

39. *The Homestead Cases*, 63 Va. 266, 274 (1872) (argument of Grattan).

40. *Hardeman v. Downer*, 432.

41. *Hill v. Kessler*, 63 N.C. 437, 445 (1869).

42. *Hardeman v. Downer*, 440. See also *Chambliss v. Phelps*, 39 Ga. 386 (1869); *Pulliam v. Sewell*, 40 Ga. 73 (1869).

43. E.g., *Stephenson v. Osborne*, 41 Miss. 119, 128 (1866); *In re Kennedy*, 2 S.C. 216, 221, 224 (1869); *Hill v. Kessler*, 443; *Sneider v. Heidelberger*, 45 Ala. 126, 134 (1871).

44. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the United States of the American Union* (Boston: Little, Brown, 1868), 287.

45. *Garrett v. Cheshire*, 69 N.C. 396, 405 (1873).

46. *Stephenson v. Osborne*, 130; *Hardeman v. Downer*, 429.

47. *Mason v. Haile*, 25 U.S. 370 (1827).

48. *Jacobs v. Smallwood*, 63 N.C. 112, 113–15 (1869).

49. Thomas, "Homestead and Exemption Laws II," 150.

50. *Hardeman v. Downer*, 450–65 (Warner, J., dissenting).

51. *Hill v. Kessler*, 448–51 (Pearson, C.J., dissenting).

52. *Homestead Cases*. See also *Russell v. Randolph*, 67 Va. 705 (1875).

53. *Homestead Cases*, 296.

54. Ibid., 299.

55. Ibid., 301.

56. *Hannum v. McInturf* was decided in September 1872. See Reporter's Note, 58 Tenn. 48. The opinion itself was not printed until the following year. See *Hannum v. McInturf*, 65 Tenn. 225, 233 (1873). See *Kennedy v. Stacey*, 60 Tenn. 220, 223 (1872) (discussing Hannum opinion).

57. *Gunn v. Barry*, 82 U.S. 610 (1873).

58. See e.g., *Cochran v. Darcy*, 5 S.C. 125 (1873); *De La Howe v. Harper*, 5 S.C. 470 (1874); *Wilson v. Brown*, 58 Ala. 63, 65 (1877).

59. *Lessley v. Phipps*, 49 Miss. 790 (1874).

60. J. H. Thomas, "Homestead and Exemption Laws of the Southern States, I," *American Law Register* 19, no. 1 (1871): 12.

61. *Lessley v. Phipps*, 799.

62. Ibid., 805.

63. *Garrett v. Cheshire*.

64. *Edwards v. Kearsey*, 75 N.C. 294 (1876).

65. *Edwards v. Kearzey*, 96 U.S. 595, 603 (1878).

66. Charles Warren, *Bankruptcy in United States History* (Cambridge: Harvard University Press, 1935), 150.

67. Ibid., 106.

68. Act of March 2, 1867, c. 176, p. 523.

69. Act of June 8, 1872, c. 399.

70. Act of March 3, 1873, c. 235 (17 Stat. 577).

71. Compare *In re Dillard*, 7 Fed. Cases 703 (Cir. Ct. E.D. Va. 1873) (1873 act void as to contracts made before its passage); *In re Deckert*, 7 Fed. Cases 334 (Cir. Ct. E.D. Va. 1874) (Waite, C.J.) (1873 act unconstitutional because not uniform in determining exemptions); *In re Shipman*, 21 Fed. Cases 1314 (Cir. Ct. W.D. N.C. 1875); *Bush v. Lester*, 55 Ga. 579, 583 (1876) (holding that "the amending act of 1873, was unsuccessful in making unconstitutional provisions in state laws a part of the system of bankruptcy") with *In re Jordan*, 13 Fed. Cases 1079 (Dist. Ct. W.D. N.C. 1873); *In re Jordan*, 13 Fed. Cases 1082 (Dist. Ct. N.D. Ga. 1874); *In re Smith*, 22 Fed. Cases 413 (Cir. Ct. N.D. Ga. 1876).

72. For the 1867 bankruptcy act, see Warren, *Bankruptcy in United States History*, 105–27; Peter J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607–1900* (Madison: State Historical Society of Wisconsin, 1974), 25–26; Elizabeth Lee Thompson, *Reconstruction of Southern Debtors*, 25–30, 135–43.

73. *In re Deckert*.

74. *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902).

75. Ibid., 188.

76. Rufus Waples, *A Treatise on Homestead and Exemption* (Chicago: Flood, 1893), ci.

77. *Creek v. Walden*, 195 N.C. 465, 466, 143 S.E. (1928).

78. Goodman, "Emergence," 494–96; Hahn, *Roots of Southern Populism*, 194–96.

79. See *Branch & Co. v. Tomlinson*, 77 N.C. 388 (1877); *Carter's Administrators v. Carter*, 20 Fla. 558 (1884) (declaring that in Florida, "where there happen to be many illiterate and unsophisticated people," such persons "are and ought everywhere to be the wards of the State").

80. As early as 1851, the Supreme Court of Texas cautioned against setting a monetary value on homesteads. See *Wood v. Wheeler*, 7 Tex. 13, 22 (1851). ("It is, in my view, to be regretted that any limitation, as to value, was placed on the homestead exemption. Property, in value, is subject to great mutation: at one point depreciated to the lowest, and at another, inflated to the highest degree.")

81. Tennessee currently provides for a homestead exemption of five thousand dollars for an individual on a principal residence. This hardly affords much protection for a family home.

82. Perman, *Road to Redemption*, 215–17 (discussing impact of bond repudiations of the 1870s on capital investment in the southern states).

83. Jonathan M. Wiener, *Social Origins of the New South: Alabama, 1860–1885* (Baton Rouge: Louisiana State University Press, 1978), 189–95.

84. Ibid., 192. ("Most of the New South industrial advocates . . . concentrated their efforts on attracting outside capital.")

85. *Patterson v. Taylor and Randall*, 15 Fla. 336, 347 (1875).

86. *J. I. Case Company v. Jones*, 89 Tenn. 337, 347 (1890).

87. Articles on homestead in the first part of the twentieth century drew no distinction between exemption laws in southern states and those in other jurisdictions. See Haskins, "Homestead Exemptions"; "Note: State Homestead Exemption Laws."

88. Lawrence M. Friedman, *A History of American Law*, 3rd ed. (New York: Simon and Schuster, 2005), ix.

89. James W. Ely Jr., "Economic Liberties and the Original Meaning of the Constitution," *San Diego Law Review* 45, no. 3 (2008): 687–92.

90. Friedman, *History of American Law*, 174.

91. Waples, *Treatise*, xcvii.

92. Coleman, *Debtors and Creditors*, 292.

93. J. Allen Maines and Donna Litman Maines, "Our Legal Chameleon Revisited: Florida's Homestead Exemption," *University of Florida Law Review* 30, no. 2 (1978): 228–29.

94. *Patterson v. Taylor and Randall*, 345–46; *Carter's Administrators v. Carter*, 569–70.

95. Dennis J. Wall, "Homestead and the Process of History: The Proposed Changes in Article X, Section 4," *Florida State University Law Review* 6, no. 3 (1978): 897–900.

96. *Milton v. Milton*, 63 Fla. 533, 536, 58 So. 718, 719 (1912).

97. Maines and Maines, "Our Legal Chameleon Revisited," 231.

98. *Daniels v. Katz*, 237 S. 2d 58, 60 (Fla. Dist. Ct. App. 3d Dist. 1970).

99. *Havoco of America, Inc. v. Hill*, 790 So. 2d 1018 (Fla., 2001).

A Place for Themselves in the Modern World

Southern Women and Alcohol in the Age of Prohibition, 1912–1933

Lisa Lindquist Dorr

IN 1920, a white woman in Andalusia, Alabama, reported that she had been raped by a black man. When the governor sent two officers to investigate, they reported back that the woman involved had been intimate with two white men, one of whom apparently became very angry that he was sharing her affections. "It is generally believed that he beat this woman up himself and, in order to protect him from being arrested, she claimed to have been assaulted by a negro. [They] were very much under the influence of drink."[1] Sexual promiscuity and alcohol consumption overrode her incendiary charge against a black man, and the state ignored her complaint. While this case occurred at the very beginning of federal Prohibition, it sheds light on the ways that women's consumption of alcohol had the power to reshape southern notions of respectable womanhood, which were always inflected by considerations of class and race. At the same time, it opens a window on the seamier side of the South, a world in which the rules of segregation and, more important, the social order, seemed suspended. This particular woman, through her drinking and immoral behavior, forfeited her claim to white men's protection in part because of her relationship with booze.

While Prohibition certainly did not mark the beginning of women's consumption of alcohol, the cases that came before the courts during this era expose the underside of southern social life. At the very least, they indicate that while temperance advocates insisted that all women supported Prohibition, a substantial number clearly did not, either by choice or necessity, and alcohol remained a part of life for numerous southern women. These cases reveal the limits not only of elite-level debates about the usefulness of Prohibition to eliminate the evils of drink but also of efforts through the law to protect and maintain the social order. They provide a picture of gritty reality

on the ground, in which interactions with alcohol often defied the accepted rules of respectable behavior. Women's relationships with booze were informed by expectations, needs, and desires about a variety of concerns from economic survival to sociability to pleasure. Whatever their situation, these interactions were far removed from ideological debates about the relative value of Prohibition as social reform or the shortcomings of its implementation and enforcement. Instead, they expose southerners' continuing relationship with liquor in their daily lives and the broader social changes involving women. During Prohibition, women refashioned Victorian notions of respectability, perforating the already porous boundary between public and private, acceptable and disreputable; and in so doing, they claimed a place for themselves in the modern world.

The social and cultural changes that occurred during Prohibition have almost become axiomatic. Many popular histories, usually focusing on cities such as New York or Chicago, expound on the colorful characters and anecdotes that made flappers, speakeasies, jazz music, and Al Capone and other gangsters notorious.[2] Nevertheless, much of the scholarship on Prohibition has gone in other directions. Numerous historians have chronicled the political debates and battles over temperance that led to the passage of the Eighteenth Amendment.[3] Others have focused on the institutional response of government entities tasked with interpreting and enforcing the law.[4] Historians have also examined the role of women's groups such as the Women's Christian Temperance Union (WCTU) in not only forcing the issue of alcohol onto the national political stage but also enhancing women's larger public influence and eventual direct political participation.[5] Catherine Murdock in particular focuses on gender in her analysis of the evolution of support for Prohibition. From passage to repeal of the Eighteenth Amendment, she examines attitudes toward the alcohol question among women. She emphasizes how alcohol, once an aspect of masculine privilege, became a social custom enjoyed in public by men and women together. Over the course of this transformation, women themselves became increasingly divided over the issue of strong drink.[6]

Most of the scholarship on Prohibition, however, with its focus on the political battles over alcohol or the legal issues raised by the amendment, provides little information about how Americans or women or southerners or southern women actually interacted with alcohol. A few notable exceptions have focused on women in more limited locales and the changes that Prohibition brought to women's economic and social lives, highlight-

ing women's place in the marketplace for booze.[7] This essay builds on these analyses, focusing not on the attitudes or political maneuverings around the alcohol question but instead on how women, black and white, rich and poor, across the South used and negotiated the meaning of alcohol in their lives in the face of and often in spite of the law.[8]

Legal records provide a tantalizing if frustratingly incomplete description of southerners' relationship with booze. Historians have analyzed cases that were appealed to higher courts that limned the legal contours of Prohibition enforcement, but appealed cases represent only a small portion of the alcohol-related cases that came before the courts. The innumerable cases that proceeded quietly through the system remain less examined. And while they are often far less detailed about the specific circumstances of a particular case, they illuminate considerably more about the myriad ways southerners used and sought to profit from alcohol despite the law. These sources certainly have shortcomings. Law enforcement officials and court officials strained these experiences through the mesh of legal requirements for arrest and prosecution. Southerners in the crosshairs of the law shaped their accounts to minimize their culpability before the courts. But the sheer volume of Prohibition cases, supplemented by other sources, helps to mitigate some of these shortcomings. Together, they open a window on the everyday world of illicit alcohol in the South.

The Eighteenth Amendment, however, did not introduce Prohibition to South. Many southern states passed statewide Prohibition laws in the early twentieth century. For example, Alabama's state prohibition law, initially passed in 1909, repealed in 1911, and then reinstituted in 1915, ostensibly allowed possession of a reasonable amount of alcohol for private consumption in the home. It went on to assert that keeping liquor in any building that was not used exclusively as a dwelling would be considered prima facie evidence of intent to sell.[9] The Eighteenth Amendment and the Volstead Act, which outlined national Prohibition enforcement, prohibited the manufacture, sale, transportation, importation, and export of intoxicating liquors. The law did not outlaw the actual consumption of alcohol; drafters of the law hoped consumers would freely testify against those who provided illegal alcohol.[10] And Prohibition did not ban the possession of alcoholic beverages in the home or the manufacture of wine and hard cider for domestic consumption by homeowners, family, and guests. This seeming contradiction neatly solved the problem of what to do with alcohol purchased legally before Prohibition went into effect, and Prohibitionists anticipated that home con-

sumption would disappear as existing supplies were consumed. Once alcohol was no longer available, they believed, Americans would lose their taste for it. What Prohibition prohibited, then, was the business end of alcohol—its supply side rather than its demand side—thereby virtually guaranteeing the growth of a vast black market in booze.

Unsurprisingly, Prohibition violations flooded courtrooms across the South, and thousands of southerners found themselves before the courts. The county attorney from Geneva County, Alabama, in his letter to the Wickersham Commission, for example, estimated that 65 percent of the county's court business concerned violations of the Prohibition laws.[11] Thus, enforcement of Prohibition cracked open the supposedly private activities within many American homes. Private activities faced public judgment as Prohibition brought government scrutiny into southerners' daily lives, and the legal edifice of Prohibition forced southerners to explain publicly their interactions with alcohol. In the process, Prohibition created a structure that rendered cultural changes on the American landscape visible in a new and disturbing way. In the local arrest records of southern cities, the case records of federal courts, the clemency petitions to southern governors, the correspondence among legal officials, and the documents of numerous federal agencies tasked with enforcing Prohibition, southerners testified to the changing social, cultural, and economic currents of their lives. The prevalence of alcohol despite Prohibition, however, revealed that long-standing racial and class assumptions about respectability and alcohol's relationship to consumption and leisure had begun to dissolve, and the definition of order was increasingly contested. In short, Prohibition indicated that a shadow world of pleasure, entertainment, and entrepreneurship was moving into the light and thriving. More important, it was embraced even by so-called respectable southerners who sought its pleasures as part of their leisure.

For women, the relationship between respectability and booze, while not absolute, was generally clear. Respectability in the South traditionally was a function both of class and race as well as gender. Women's value was determined by the extent to which they upheld notions of virtue, morality, purity, and domesticity. In the nineteenth century, these notions did not absolutely preclude respectable women's consumption of alcohol but circumscribed it in ritualized, formal settings.[12] While many Victorians questioned whether working-class women could uphold notions of respectability, it was clear especially in the South that African American women could not. African American reformers worried that whites would view black women's drink-

ing as evidence of the lack of respectability among African Americans as a whole.[13] Embedded within respectability was a related ideology that insisted that white women exchanged subordination to patriarchy for protection and support. While this protection did not insist on women's confinement to the domestic realm, it was understood that engagement with the wider public world could nonetheless erode both access and claims to protection.[14] Prohibition did not set out to challenge class- and race-based ideas of respectability—in fact, quite the opposite. Temperance advocates saw prohibiting alcohol as a way to replace male views of alcohol and leisure with state-sponsored visions of respectable sobriety.

Nonetheless, challenging ideas of respectability is exactly what Prohibition did. The failures of Prohibition reflected new behaviors among seemingly respectable women and indicated to some observers the demise of respectability and traditional roles for women. Ada Brooks of Atlanta expressed her alarm to the Wickersham Commission, tasked with explaining the rise of crime during Prohibition: women, she wrote, "are suffering from a 'subsidence of moral foundations' because they, as a whole, have but *few*, if *any*, positive convictions."[15] R. S. Withers from Jackson, Mississippi, concurred, focusing on social and sexual changes that reflected the new morality of the nation's youth: "The young sheik with a flask on his hip and the modern flappar [*sic*] with a box of 'merry Widows' in her reticule, throng our highways nightly and indulge in practices which are rapidly destroying the morals and future welfare of the youth of the land." Indeed, 42 percent (thirty-two of seventy-seven) of the southern legal officials who wrote to the Wickersham Commission with their views of law and order during Prohibition cast at least partial blame for the rise in crime in the 1920s on a lack of home training, the avoidance of parental responsibility, and increasing immorality in general. In their view, parents, determined to pursue their own pleasure, were not raising their children responsibly. Ironically, while Prohibition was intended to enforce middle-class ideals of respectability regarding drink, in practice, the very activities it sought to eliminate no longer seemed so disreputable to a growing portion of the population who nonetheless considered themselves respectable.

Many southern women insisted that a distinct relationship existed between respectability and temperance. But they bemoaned their inability to impose their morality on their communities even with the help of a Prohibition law. The files of Alabama's governors contain more than a few letters like the one from a group of women in La Pine denouncing the "acknowledged

leaders" of their community who were "dealing in rum and are unscrupulously selling it to our young men and boys, some of whom are still wearing short trousers."[16] An attorney in Decatur, Alabama, apparently faced similar problems, insisting that the liquor traffic in his community was "leading at least seventy-five percent of the young men of this locality into dissipation and in its train fostering other offenses against the law."[17] Believing that Prohibition validated their view of community values, these correspondents expected local leaders to enforce the law and the governor to step in when they failed. Instead, Prohibition created especially visible and troubling alliances between supposedly responsible patriarchs and those who represented the antithesis of respectability. A resident of Opelika, Alabama, begged Governor Bibb Graves to "answer a mother's anxious prayer" and enforce the law in her town: "There are so many crooked women and so much whiskey the whole town is in a mess."[18] Mary Mulat of Geneva, Alabama, was nominated by the "good women" in her neighborhood to write to the governor about the problems in her community. A local filling station was the central gathering place for "women of low character who sell rum and home brew. They take our men's money while we stay at home and care for our children with a dread as to what may happen. I know what it means to be beat up by a man crazed with drink," she wrote.[19] The intersection of degraded women and supposed patriarchs posed the greatest threat to community welfare. Rather than fostering gender solidarity among women, as temperance advocates had insisted, the business prospects of Prohibition instead allowed disreputable women selling booze access to husbands and sons, luring them away from respectable wives and mothers. It was a temptation against which respectable women's moral influence simply could not compete.

Ideally, law enforcement had the power to make men remember their responsibilities—it was, after all, one of the reasons the amendment had passed. Prohibition provided the law with the ability to intervene in domestic issues, and southerners seized that mandate to rectify what they saw as untenable situations. Mrs. T. B. Spurgeon asked Governor Graves to investigate her son-in-law, Reid Allen, paroled from prison in 1934. He had returned to selling whiskey, had threatened his wife with a knife and a razor on several occasions, and had even threatened Mrs. Spurgeon with a gun.[20] Rosalind Green sued her husband of two years for divorce, claiming habitual drunkenness. For nearly nine months, she testified, he had been almost constantly under the influence of alcohol and had stayed out until 1:00 a.m. virtually every night.[21] She was successful in her petition. Talmage Price was

divorced from his wife for cruelty and was sentenced to hard labor as a result of an assault and battery conviction. But after his parole, he got drunk and returned to her home to harass her, landing him back in prison for the remainder of his forty-five-day sentence. These cases reinforced the WCTU's arguments that women and children suffered because of the availability of drink. But even with the legal mechanisms that ostensibly prohibited alcohol, men still drank and their wives and families suffered because of it, though the state had additional means to intervene.

Women's drinking could also destroy families. A. A. Woods petitioned for divorce from his wife, Inez, in 1925 on the grounds of adultery. While he had caught her with another man, he also noted in his petition that he had "seen [his] wife . . . go into different houses and stay a great length of time at night. She has come home intoxicated numbers of times after the parties she would go on with men."[22] In another case, a fourteen-year-old girl named Mary had been in and out of jail for several months before she was placed in the State Training School for Girls in Birmingham. Mary, however, refused to return to her mother's care. "Mary is a very bright, smart girl of fourteen years of age. The mother, I am sure, is addicted to drinking, having been here under the influence of liquor. The child does not want to return to her mother and is ambitious and desires an education."[23] Mary was incarcerated because of her own behavior; her mother's drinking, however, gave the state the means to substitute its own system of moral control. By constructing an additional layer of criminal sanction surrounding alcohol, Prohibition created the legal leverage to restructure families along more respectable lines.

To temperance advocates, one of the more concerning aspects of alcohol was its effect on morality. Drunken revelry and entertainment brought women and men together and seemingly encouraged them to taste pleasures not yet sanctioned by marriage. In essence, it damaged families even before they were fully formed. Respectable women lost no time in identifying the connections between alcohol, new forms of nightlife, and the potential for sexual immorality. Mrs. Alexander Greet of Gadsden, Alabama, was especially concerned about the role that alcohol was playing at innocent social events. Writing on American Legion Auxiliary stationery, she lamented "the inroads being made upon our American Legion and Auxiliaries by booze." The American Legion Auxiliary had established a series of pageants, allowing local women to travel to American Legion Conventions around the country. Her letter outlined the drinking at national conventions in New Orleans and San Francisco as well as around Alabama. From drinking on

the train to "quantities of [alcohol] in the bath tubs with ice for sale," alcohol seemed ubiquitous; she hoped the governor would act to protect "the men and women and girls" at the next convention. In her opinion, "more of our women are getting drunk now, and several, if not many of the young girls, as well as women, were drinking at Huntsville. There is nothing wholesome or uplifting about this Beauty Contest business."[24] Instead of a respectable social event, conventions had become occasions of drinking and carousing among young people. Her concerns were shared by others. An anonymous student at the University of Alabama also connected drinking and sex when he informed the governor that a professor had enabled a student to obtain cash knowing that the student intended to use it to purchase whiskey. He then noted that the same student "a few nights later went to bed with a coed in one of the Frat Houses."[25] Faced with what in their view was an effort to flout the law and engage in immorality, concerned citizens demanded that the state act to enforce behavior that was both legal and respectable, in the process protecting and promoting appropriate relationships.

Temperance advocates in some ways were justified in their concerns. One of the long-term consequences of Prohibition, scholars argue, was that it made public drinking and socializing with members of the opposite sex acceptable for women. Drinking, even in the South, despite the concerns of citizens who wrote their governors in alarm, was going mainstream.[26] How else to explain the recipe for bathtub gin sent to Sara Mayfield, a young college woman from a prominent Tuscaloosa family, by one of her male college friends? The recipe called for one pint of "Mr. Al K. Hall," one pint of distilled water, four to five drops of oil of juniper, and one tablespoon glycerin and included the assurance, "I know there is nothing in this Rx that is poisonous."[27] College students shared drinking stories and recipes in correspondence, equating consumption with sociability and youthful spirit. While male drinking was more accepted and expected among adults, parents could nonetheless pay a price. Mrs. R. C. Redus, for example, was forced to file suit in Tuscaloosa to regain possession of her Cadillac, which she had loaned to her son to take with him to the University of Alabama. It had been confiscated when he was arrested for transporting whiskey in it.[28] College humor also contained frequent references to drunken coeds. Students traded jokes about alcohol at dances and generational gaps in terminology. The inaugural edition of University of Alabama's humor magazine, the *Rammer Jammer*, printed a small bit of humor that suggested that Sara Mayfield's interest in illicit booze was not unique. "The only time a girl does not want the spotlight

on her is when she is on a wild party. All she wants then is moonshine, fifty percent moonshine and fifty percent moonshine."[29] The problem of course was the spotlight that illicit drinking could attract during Prohibition. Young women who exhibited signs of public drunkenness moved from private to public censure. Rumors about a drunken female student being carried into a fraternity house at Auburn caused such a scandal that they reached the governor's office.[30] Not only did these cases make young women's drinking visible, it also demonstrated their claim to new forms of socializing with men, in public, at night.

One indication of this trend resides in the arrest records for Birmingham. These records demonstrate that drinking among women was not unprecedented before Prohibition. In the first six months of 1912, for example, 90 percent of the arrests of women for alcohol violations involved drunkenness, but those numbers represented only forty-seven arrests. Under state prohibition laws in 1917, only twenty-nine women were arrested for drunkenness—85 percent of all of women's alcohol violations. By 1928, women's arrests for drunkenness accounted for only 37.6 percent of women's arrests for alcohol violations, but 146 women had been arrested.[31] By the point at which many Americans were questioning the relative utility of the Eighteenth Amendment, Birmingham police were encountering not only increasing numbers of Prohibition violations among women but also growing numbers of drunken women in public.

These records, however, also indicate that the social context in which drinking among women occurred had changed and, by extension, the relationship between a woman's alcohol consumption and her respectability. For example, both in 1912 and in 1917, women arrested for drunkenness tended to be arrested on their own. Mattie Ellis, for example, an African American woman, was arrested at 10:30 p.m. on June 9, 1912, for being drunk. Laura Champion, a white woman, was arrested at 12:30 a.m. on August 20 for the same reason.[32] The arrests above and below each of these women on the docket were at different times and by different arresting officers, indicating that they were unrelated incidents. In short, the two women were arrested alone. A similar pattern holds in 1917. While hard to prove definitively, these arrests paint a picture of lonely women perhaps isolated by the very fact they were drunk in public.

By the latter part of the decade, while being arrested was probably a dubious distinction, arrests of women were often part of a sociable evening out on the town, with men and women arrested together. Maud Swindle, a

white woman, for example, was arrested at 11:30 p.m. on October 7, 1926, for being drunk, along with John William of Memphis, who faced drunkenness charges as well.[33] Exia Hargrove and Mary Spencer, two black women, were arrested for being drunk on October 28 at 2:00 in the morning, along with a white man and two black men who faced charges of being drunk and driving an auto while intoxicated.[34] And one can only wonder what Alma Gant was doing out with D. F. Winn at 1:15 in the morning on October 19 when she was arrested for public drunkenness and he was arrested for driving while intoxicated, speeding, and violating the liquor laws.[35] These examples are only a few that are spread throughout the arrest records between 1926 and 1928, and they indicate a new public, sociable culture of alcohol consumption and arrest as a shared experience. While women still represented only about 12 percent of Prohibition arrests, more and more of those arrests interrupted the dates of couples for whom alcohol was part of an evening's entertainment. They are the visible growth of a changing social culture in which women and men drank together in public and occasionally faced legal consequences when they were caught. The hours during which women were arrested strengthen this conclusion. More and more women were being arrested on the streets, in the company of men, late in the evening or during the wee hours of the morning. Drinking for women was part of a new fashion of sociability and, despite disapproval among many quarters, no longer necessarily branded them as disreputable. By the 1920s, even at Deep South universities such as Alabama, dating and drinking went hand in hand, as it apparently did in Birmingham and other cities as well.[36]

Women also claimed the right to more extensive kinds of public leisure that increasingly revolved around alcohol. Drinking was now an integral part of women's activities, something they did with others as part of normal social engagements, not something that occurred in the invisible confines of home and family. Arrests for drunkenness were seemingly no longer the province of lonely women on the streets. Alcohol also structured more extensive bouts of recreation, such as vacations. Travel to Cuba in the 1920s in particular catered to Americans who sought to escape limits on public drinking that Prohibition sought to impose at home. Bacardi advertisements promised to introduce a tropical paradise to American tourists who traveled to Cuba, openly connecting Cuba, Bacardi, and fashionable, sophisticated leisure in the minds of American tourists.[37] Numerous Americans traveled to experience this phenomenon for themselves during the height of Cuba's popularity as a tourist destination between 1924 and 1931. Between December 1925 and March 1926, forty-five thousand U.S. tourists visited Cuba.[38] It

was no secret that Americans—including women—traveled to Cuba to do that which they could not do (or were not supposed to do) at home.

On their return, some tourists sought to bring those experiences back to the States with them in potable form. Legal records reveal women who traveled to Cuba as tourists and attempted to smuggle booze back into the United States. In 1922, Carmela Perez, who arrived back on U.S. shores aboard one of the regular ferries operating between Key West and Havana, was charged with importing seven bottles of liquor, one bottle of wine, and seventeen yards of linen.[39] Winfreda Paris was so outraged that she had been caught smuggling booze by a federal Prohibition agent upon her return to Key West that she accused him of stealing her jewelry in the course of his search. He eventually had to petition the court to dismiss the vengeful charges levied against him.[40] Lucy Thistlewaite was returning from Cuba with her husband when the customs agent in Key West noticed that her overcoat looked excessively bulky. Closer examination revealed that she was wearing two coats in which she had stashed five quart bottles of liquor.[41] She pled guilty and was fined one hundred dollars. Even members of Congress were not immune to either the seductions of Cuba or the temptation to circumvent the law. M. A. Michaelson, a representative from Chicago, was arrested and charged with bringing the makings of an entire bar in his suitcase from Cuba—whiskey, crème de menthe, crème de cacao, and brandy. Charged with the intent to sell, Michaelson asked for a jury trial and was acquitted. His arrest had occurred, however, despite a telegram from Washington requesting that he be given free entry privileges as a member of Congress.[42]

The trade in alcohol that was illegal in the United States was legal in most of the rest of the hemisphere, creating not only the opportunity for vacation pleasure and to slip a bottle or two into the country but also large-scale smuggling. The Cuban government insisted that it had limited responsibility to enforce U.S. laws that ran counter to Cuba's own laws. Despite the eventual signing of a treaty in which Cuba agreed to help stop illegal shipments of liquor to American shores, Cuba and the greater Caribbean remained one of the primary locations from which illicit shipments of alcohol made their way to the United States, and much of this contraband landed along the Gulf Coast. Prohibition created a black market in which providing illicit booze to thirsty Americans was enormously profitable, fostering large business enterprises in the South in which smuggling was the primary activity. Vast smuggling networks were overwhelmingly a man's business, but women occasionally sought a piece of the action.

Pearl Morales is one of the better-documented examples of a southerner

who sought profit in the liquor trade. The Kentucky-born girl graduated from high school in 1910 and went on to get a business degree and work as a stenographer, earning enough to enable her to take a trip to Cuba. She found that she liked living in Havana, and decided to stay, marrying Robert Morales, the rich son of a sugar planter. They led a pleasant life in Santa Clara until his family fortunes declined. Forced to find work to aid the family and help support her child, Pearl Morales returned to Havana and worked as a stenographer, becoming well known among American expatriates, while her husband tried to recoup the family fortunes. According to undercover agents reporting to the Coast Guard in Florida, Pearl Morales decided to seek a more lucrative position, and in July 1926, she traveled from Havana to New Orleans and introduced herself to John Damonte, a well-known rumrunner, offering to sell his liquor for him in Chicago. He provided her with living expenses as well as a cut of the liquor she sold, and she went to Chicago to await his shipment. Unfortunately for Morales, law enforcement officials were closely following Damonte's activities, and his shipment of booze was seized by the Coast Guard en route to the Gulf Coast. With no inventory to sell, Morales returned to Havana and resumed her duties as a stenographer, eventually giving information to U.S. Prohibition officials there. They approached her in part to determine whether a female secretary in the Prohibition Office in New Orleans was tipping off smuggling rings about law enforcement activities. Her cooperation marked the end of Morales's attempts to profit from rum-running.[43] She was indicted along with a group of men charged with smuggling and agreed to become a government witness.[44]

The experience of Pearl Morales suggests an exotic world funded by smuggling and fueled by intrigue. She was also exceptional in part because she worked at a time when most women expected to be supported by their husbands. For Morales, that expectation led to disappointment. Other women's interaction with smuggling enterprises conformed with more traditional ideas of women's role in marriage, in which men served as breadwinners and women played supportive roles in their husbands' work responsibilities. Indeed, respectable wives could be married to men involved in disreputable though well-organized and profitable businesses. Large-scale operations of liquor smuggling or distilling for sale were male enterprises, often with multiple employees with disparate responsibilities. Few included opportunities for women to take part. One exception, a smuggling enterprise along the Florida coast that transported liquor to Atlanta in cars, employed women

drivers to throw off suspicion.[45] But the fact that most of these syndicates primarily employed men seems evident from the court records. Cases involving these types of operations often involved numerous defendants, and only rarely were women indicted alongside the men.

Women appeared in these cases usually as the wives of defendants. Wives were often ignorant of operational details, observing rather than directing or facilitating business interactions and relations. They might testify regarding their husbands' whereabouts and associations, but they were not privy to the details of the business. They acted, in short, as respectable wives should, even though their husbands were engaged in a criminal enterprise. Ella Carey, for example, testified for the prosecution in Florida in 1921 that she saw several business associates of her husband place cases of smuggled booze into the rafters of their house through a hole in the roof. She also testified that she served them whiskey and water while they talked at her table about how to evade the law.[46] Gregory L. Smith, a witness in a notorious Mobile, Alabama, trial, testified, "My wife was not engaged in any [liquor] business. She had a large account in which large deposits were made in the Peoples Bank. The proceeds from the sale of liquor were deposited in that account and my wife drew checks on it," using the money for her normal housewifely duties.[47] Mrs. Louis H. Williams, the wife of a defendant in another Mobile case, testified that she had seen her husband's associates take a quart of whiskey out of a car and had even on occasion taken money to another associate for him. When asked whether her husband had told her what the money was for, she replied, "Not right then he didn't, but I knew."[48]

Most southerners lacked the means to construct vast smuggling enterprises with high profit potential. Nevertheless, alcohol remained an economic issue in the lives of poor southerners both black and white. Many southern women violated Prohibition laws for profit. If anything, the poverty of the Deep South likely encouraged more poor whites and blacks, excluded from even the most elemental mandates of respectability, to turn to alcohol as a way to make ends meet. Alcohol could provide profits in numerous ways. It was smuggled in from the West Indies and sold to local bootleggers, who, in turn, sold it to individual retailers. Simple stills could be constructed in remote woods or even in kitchens. Supplies of local moonshine could be purchased to subdivide, dilute, and resell. Small amounts of whiskey could be sold by the half pint or even the drink. The cases of Prohibition violators indicate the extensive reach of the business of alcohol and a murky world of hidden enterprise driven by capitalist concerns of supply and de-

mand, all in violation of the law. The everyday market for booze brought many of these purveyors before the courts and in the process placed their lives and those of their families in the historical record.

Many southerners convicted of Prohibition violations petitioned their governors to shorten their sentences. The form asked them to explain why they had engaged in illegal activities. Many men and a few women replied that they needed the money: they "wanted what there was in it" or "wanted what I could make at it." These answers certainly conformed to what many legal officials would later identify as the causes of crime under Prohibition—greed, often informed by necessity. Others were more specific, noting that their families were in need; one reported that he "needed money to support my wife and two children."[49] For many people, producing and selling alcohol was an integral part of a makeshift economy in which poor farming prospects or low wages could be supplemented by the proceeds from a still or the small sales from a gallon of hooch kept in a shed or kitchen cupboard. The nexus of alcohol and respectability as well as concerns about upholding the law were, by necessity, far from their minds.

Unsurprisingly, women whose husbands were convicted for Prohibition violations faced considerable hardship. Indeed, such hardships were one of the most common reasons cited in petitions for early release from prison. Jessie Helton pleaded with Alabama's governor, Benjamin Meek Miller, to release her husband, who had been convicted in 1930: "I am left with seven children to care for, I am living on a rented place working on halves and I tell you I just don't see how I can make a living for my children."[50] Letters to southern governors spoke to the extent of many families' desperation. The wife of T. B. Homer asked for his release because "her people" could not support her and her baby, and she was unable to find work. Her options were doubly limited: both her father and her father-in-law were physically disabled and unable to work.[51] Jim Barfield, Harvey Bannister, and Monroe Bailey were released on probation by Georgia's governor because their families needed their support, although the attorney who prosecuted Monroe Bailey questioned economic need as a justification for releasing convicted criminals: "It is my judgment that the only way you can treat bootleggers is to give them a stiff sentence and require them to serve it." His opinion apparently fell on deaf ears, and Bailey was released.[52]

These petitions overwhelmingly were submitted by male Prohibition violators. As family breadwinners, facing a law that targeted alcohol primarily as a business, it is perhaps not surprising that most violators of Prohibi-

tion laws were men. This does not mean that women were not involved in the business of alcohol, but perhaps it does explain why in Mobile and Birmingham, Alabama, women represented only about 10 percent of Prohibition cases and even fewer in Macon and Columbus, Georgia. The petitions suggest that women simply were not breadwinners to the same extent as men. Dependent on husbands for their livelihoods, women relied on their husbands' bootlegging success.

Women did, however, participate in this economy more directly, though usually on a smaller scale. Lizzie, Love, and May Johnson of Macon, Georgia, were arrested for manufacturing moonshine after they were caught with nineteen gallons of whiskey and four hundred bottles of beer.[53] Lillie Hudson, a black woman, was convicted in Dallas County, Alabama, in 1925 and sentenced to one year in prison for distilling, a business in which she was engaged, she said, because she needed the money.[54] In Birmingham, during six months in 1922, 157 black women were arrested for violating Prohibition laws, a charge distinct from public drunkenness. White women also engaged in the liquor trade. Fifty-five white women faced such charges in Birmingham during the same period.[55] Men occasionally even took the fall for their wives. Bernie Brown, a white man in Cullman County, Alabama, was convicted in 1925 of manufacturing whiskey and received a sentence of one year in prison. Seven months into his sentence, he petitioned the governor for early release, stating that he had manufactured whiskey solely to solve family financial troubles, and his wife needed his support. The attorney who prosecuted his case clarified the matter for the governor: "The defendant's wife was caught making whiskey and he was at the still with her. He claimed that it was her still and that he had nothing to do with it at all, but she had about *seventeen children* and nobody to take care of them and the husband agreed to plead guilty and go to the penitentiary and serve a year and a day in order to let his wife take care of the children." The judge noted on the back of the petition that the Browns only had six children (still a substantial number), and the petition was denied.[56] In this case, a woman took on a male role when it came to manufacturing alcohol and earning money, but her husband would not take on her role in child care when she was caught. Even the court seemed more than willing to enforce the law in a manner that reinforced traditional family roles based on the concept of a male breadwinner. Brown did the time for his wife's crime of supporting their family with the proceeds from a still, but he was spared having to care for the children.

Not everyone got into the liquor business to take advantage of price hikes for liquor caused by Prohibition. For some, it was and had been a family business for generations, apparently providing steady income that made the risks of illegal activity acceptable. The skills and business plan were handed down just as they were for any other kind of family enterprise, and the endeavor became problematic only when it attracted the attention of the law. Lillie Gentry, for example, found herself jailed in Tuscaloosa in 1921 on a Prohibition violation. She was poor, married, and the mother of four children with another on the way. She and her husband had been arrested in late 1920, and he had been convicted of manufacturing whiskey and sent to jail. Lillie Gentry escaped charges because she was pregnant. She was arrested again, however, in 1921, having continued the family's liquor trade while her husband was incarcerated. Described in the *Tuscaloosa News* as being "as defiant as a tigress at bay in the jungles of Africa," she defended her efforts to support her family. "Her grandfather and her father had made whiskey before her, her husband was a whiskey-maker, and now that he had been placed in the penitentiary for a year and a day, she knew no other way to make a living for the four little ones left for her to support but to make whiskey." She spent several months in jail, visited by the respectable women of the city. According to the paper, they preyed on her concern for her children to convince her to mend her ways. When she was released from jail, she reportedly intended to abide by the law (especially since the charges against her had been waived only as long as she refrained from violating it). The paper did not indicate how she intended to support her family without selling hooch.[57]

Women played a significant role in retail liquor businesses when the selling of illicit alcohol accompanied the provision of other services in boardinghouses, cafes, or houses of prostitution. Providing alcohol fit seamlessly within women's traditional role in providing home, food, and sex. Women often came to the attention of authorities in these sorts of alcohol businesses. For example, Pauline Nunnally of Savannah, Georgia, was convicted of selling whiskey out of her house in 1925. She received two years' probation, which was revoked when she was again arrested for selling whiskey in 1927.[58] Bertha Bly and Virginia Raspberry were arrested for selling whiskey at their rooming house in Tampa. A search by officers had located a kitchen cabinet containing "a dozen or more empty bottles and several empty fruit jars that had contained illicit whiskey."[59] Mabel Matthews reportedly stored nineteen half pints of whiskey waiting to be sold in her outhouse.[60] Bessie

Scroggins was arrested in Birmingham, Alabama, in 1926 both for being drunk and for running a disorderly house.[61] Sarah Rutherford was arrested a few days later, also for running a disorderly house, but she was arrested with three men, all of whom were charged with being drunk.[62] In some cases, women controlled the business, at least in the eyes of the law. Cleveland Burnes and Salina Burnes were arrested at the same time in Birmingham in January 1927 for violating the state liquor laws. The charges against Cleveland were dismissed, while Salina was fined fifty-six dollars, suggesting that she was the responsible party.[63]

Birmingham's municipal court docket books, from which the cases of Sarah Rutherford and the Burneses were drawn, give little information about the stories behind the arrests. We do not know, for example, what Sarah Rutherford was doing with the three men with whom she was arrested. But unlike many case files in U.S. District Court records, the Birmingham docket books list the race of those arrested, illuminating the impact of race in the world of booze during Prohibition.[64] More than thirty-one hundred of the ten thousand cases listed in the docket book covering 1926 to 1928 involved some kind of liquor violation, whether it was violating the national Prohibition laws or state liquor laws, being drunk in public, or driving an automobile while intoxicated.[65] Thus, more than 30 percent of the Birmingham municipal court's caseload stemmed from legal efforts to prohibit alcohol. Of the 3,156 cases that clearly involved alcohol, 1,562 involved the arrest of white men, 1,206 involved the arrest of black men, and 388 (or just over 12 percent) concerned the arrest of women. Arrests for alcohol violations clearly were overwhelmingly the province of men. These numbers held steady over time. In 1912, when Alabama had no Prohibition laws (only laws against selling liquor without a license and public drunkenness), only 11 percent of alcohol cases involved women.[66]

But taken apart further, these records reveal much about how female arrests changed during Prohibition with regard to race. Of those 388 arrests of women in Birmingham between 1926 and 1928, 100 involved white women and 288 involved black women—this at a time when Jefferson County, which included the city of Birmingham, was approximately 60 percent white. White women's race apparently protected them from arrest. Either they violated liquor laws at a lower rate, or, when confronted by police, they managed to avoid arrest. Police officers saw what they expected to see when they confronted women with alcohol, accepting stereotypes that

black women were likely to violate the law while white women were not. Indeed, black women always comprised a majority of the cases of alcohol violations involving women.[67]

During Prohibition, however, the charges black and white women faced changed. Before the Eighteenth Amendment, at least 85 percent of alcohol charges against women involved being drunk, and approximately 15 percent involved charges of selling. By 1922, those numbers had flipped; only 10 percent of women (both white and black) faced charges of drunkenness, while 90 percent faced charges of manufacturing or selling booze. However, three times as many black women were arrested as white women. By 1928, almost half of white women were arrested for being drunk in public, while only 34 percent of black women were arrested on that charge, and they were often in male company; 66 percent were arrested for Prohibition violations. A substantially higher number of black women (fifty) than white women (eight) were arrested on charges that involved suspicions of manufacturing or selling alcohol. As Prohibition became less popular, white women were more likely to be arrested for being drunk, while black women were more likely to be arrested for charges involving the business end of alcohol rather than its consumption.[68]

For many women, then, alcohol was a way to make ends meet, a moneymaking enterprise that echoed their domestic responsibilities and dovetailed neatly with household tasks.[69] Selling whiskey might fit in easily with home-centered rituals of sociability, as outside observers would perceive customers as little different from visiting friends. The experiences of women in the South, however, were conditioned not solely by their gender but also by their race. White assumptions about black behavior made black women more likely to catch the eyes of law enforcement when their homes became a bit noisy in the wee hours and made African American women more vulnerable to arrest. White assumptions about criminality and the persistent willingness among whites to thrust undesirable tasks on African Americans could present some opportunities, and African American women took advantage at the expense of whites. Dinah Toombs, a black woman, perhaps represents a unique case, but she nonetheless exploited common understandings of racial relations to make some quick cash. She was convicted of grand larceny in Dothan, Alabama, and sentenced to a maximum of two years in prison. The incident for which she was convicted involved the robbery of a white man, but authorities cited her other illicit dealings to argue that she should not be released on parole. "It was also reported to the sheriff

that this woman . . . received a twenty-dollar bill from a white man to buy him a pint of whiskey and that she went off with the money and did not return."[70] She clearly was not averse to taking a white man's money and misleading him about her intentions to do as he demanded.

Issues of race, class, and gender permeated the enforcement of Prohibition laws and shaped how law enforcement officers identified targets for arrest. Police officers were willing to see black women with more than a drink's worth of booze as intending to sell liquor illegally. They viewed white men as the logical managers of distilling and distribution organizations. Turning the home into a potential site of illegal profit through alcohol, however, further blurred the permeable boundary between public and private space. Many whites believed that the privacy and integrity of the household simply did not apply to black families, and the intrusion into the household that Prohibition enforcement encouraged often put black families at greater jeopardy than white families. While appeals courts ultimately rendered decisions on the extent to which Prohibition enforcement was required to respect the privacy of the home, their rulings were far from the experiences of local law enforcement officers on the ground. The Volstead Act, the legislation outlining the enforcement measures for the Eighteenth Amendment, specifically did not forbid domestic possession of alcohol because the amendment did not prohibit consumption. The act also allowed for the home production of wines and hard cider, though not beer. Prohibition was not intended to be enforced in the home, primarily because the evils of alcohol by the 1910s apparently resided in the saloon. The home was one of the few arenas in which drinking should have remained outside the purview of federal interference.[71] But for local officers faced with upholding their notion of order in their communities, legal rulings of distant courts were often beside the point.

For poor southerners, especially blacks, however, the home was not a privileged sanctum, immune from the prying eyes of the law. Pearlie Ezell, a black man, was convicted in Escambia County, Alabama, for violating the Prohibition law. In his account, "While out working in a field, an officer raided my house and found a half-pint of liquor which I have for my own use. I did not have any charge of selling liquor against me." Under the home use exemption, he should not have been in the crosshairs of the law. In another case, the local justice of the peace pleaded on Pearl Jones's behalf, saying, "There was found in Pearl Jones's house one half a coca-cola bottle of whiskey by the sheriff of Hale County. There was no evidence to show that she ever sold any whiskey."[72] These cases indicate that the integrity of

poor people's homes was considerably more tenuous than those of wealthier white southerners. African Americans could muster the assistance of whites, as Pearl Jones did, indicating the muddled nature of race relations in southern communities. But the fact that blacks such as Jones needed to call on white patrons also indicates the extent to which Prohibition laws could be used to open black homes to white intrusion. The controversy caused by a series of raids in Mobile in 1921, conversely, illustrates how quickly elite whites could muster public power to maintain the privacy of their domestic realms even when it came to alcohol.

In July 1921, state law enforcement officers raided the home of Mrs. Harry Gordon Donald. It is unclear why the officers targeted the Donald home. Officers may have suspected Prohibition violations there because Donald's daughter, Kate Barlow, was living there while she obtained a divorce from her reportedly drunken husband. Major Barlow apparently had left no whiskey on the premises, but the officers did find 61 bottles of homemade blackberry wine (which were legal under the Volstead Act) and 134 bottles of homemade beer (which were not). In fury, Donald wrote to Governor Thomas Kilby insisting that she did not know she was violating the law by making wine from the blackberries that grew on her property. She insisted that by these standards, officers would find liquor in virtually every prominent citizen's home.[73]

The Donalds were only the first. Later the same week, the home of a former bank official, Henry Hall, was raided, as was the home of Albert P. Bush, a well-known local businessman. In both houses, officers found bottles of homemade wine and beer. The raids caused considerable controversy across the state. An editorial in the *Mobile Register* denounced officials' actions; a letter sent to the governor with a clipping of the paper's editorial warned, "These are reputable families in this city. Such abuse of law enforcement will tend to kill the value of the law." There is some suggestion that Mobile authorities were, if not turning a blind eye to Prohibition violations, overwhelmed by the magnitude of the enforcement problems. An anonymous October letter to the governor noted "that it has gotten so bad Ladies [are] not safe from insults in town on account of shinny sellers and makers. [They] got all negroes boot-legging all over town." Not only were blind tigers (speakeasies) located in the heart of the city, but, this writer reported, "immoral houses" were situated "in almost every block, women lying up not working and . . . ruining the young generation."[74] This writer made a clear connection between the availability of intoxicating drink and widespread moral decay, but the purveyors of that destruction were not respectable whites. While it

was one thing to search the homes of black women such as Pearl Jones, respectable homes of white citizens were something else entirely. It was "an outrage that because a man may have in his home either whiskey, wine or beer for his own use that the sanctity of his home should be invaded and he should be held up to the public as a criminal."[75] Another citizen insisted that Prohibition was less important than "the sanctity of Alabama homes." "It is not Prohibition or its enforcement but the heretofore unquestioned right of respectable American citizens not to have their homes rudely invaded and the privacy of their wives and daughters intruded on by outsiders."[76]

Eventually, it was this very concern—whether respectable citizens should be able to drink in their homes (which the Volstead Act permitted) or whether by doing so they undermined Prohibition as a whole and respect for the law in general—that decisively undermined the Eighteenth Amendment. Temperance advocates found themselves utterly taken aback that many respectable and otherwise law-abiding Americans continued to want to drink without the coercive machinations of the liquor industry. By the mid-1920s, it was increasingly clear that they did. In Mobile in 1921, elite respectable whites cried foul when the few law enforcement officers allowed by the state's budget spent "their time searching the homes to find a few bottles of beer and a few bottles of blackberry wine now and then."[77] They believed that the problem of alcohol lay in the drinking of less respectable groups. Governor Kilby fired the Prohibition agents responsible for the searches in Mobile and chalked up their gaffes to unfamiliarity with the particulars of the Prohibition law. Nevertheless, the issue highlighted the ongoing assumptions about what kinds of people were potential criminals under Prohibition. Surely it could not be the respectable matron with her homemade wine. Nor could it be the respectable businessman, even if large amounts of whiskey were found in his cellar or in his luggage when he returned from Cuba. But for poor southerners and especially poor black southerners, possession of even moderate quantities of alcohol automatically suggested their intent to sell, and that was a violation of the law. While respectable whites lamented the college antics of their sons and daughters and decried blind tigers in their midst, they nonetheless insisted that the effort to eliminate the social disorder created by booze belonged in the gritty margins of the public realm, not the privileged domestic spaces over which they presided. They sought to reinforce the boundary between public and private in the face of Prohibition's tendency to pry open the home to public view.

The 1921 controversy in Mobile concerned both the relative sanctity of middle-class homes from intrusion by the state and the extent to which law-

abiding citizens could or should drink alcohol. But many other sources suggest that southern men and women lost little sleep pondering the issue. Instead, they chose to drink or to sell drinks if they thought it might improve their lives or their fortunes. Their desires overwhelmed the concerns of other southerners who clung to earlier notions of acceptable behavior and fought to uphold a notion of respectability in which the consumption of alcohol had no part. They were fighting an uphill battle, as were those tasked with enforcing the law.

In the South, Prohibition created a world of producers and smugglers and an underground economy in which providing illicit booze could be a way to make ends meet. It also created a world of pleasure and entertainment in which alcohol enhanced experience. Increasing numbers of southerners, particularly women, saw nothing amiss in partaking of such enjoyments. Crime increased during Prohibition, and cases flooded southern courtrooms, but the cases involved small-scale efforts to survive or to take part in a world of public leisure, whether that leisure was a night's entertainment or a trip to Havana. And it was a world in which women, despite shrill insistence to the contrary, claimed a place for themselves.

NOTES

1. C. W. Austin to Thomas Kilby, n.d., Alabama Governor (1919–1923: Kilby) Administrative Files, Folder 12, Box 22128, Alabama Department of Archives and History, Montgomery (ADAH).

2. Frederick Allen's first pass at a history of that era, *Only Yesterday*, laid out a framework that has proved enormously resilient. Allen, *Only Yesterday: An Informal History of the 1920s* (New York: Harper & Row, 1931). Subsequent histories include Daniel Okrent, *Last Call: The Rise and Fall of Prohibition* (New York: Scribner, 2010); Michael A. Lerner, *Dry Manhattan: Prohibition in New York City* (Cambridge: Harvard University Press, 2007); Edward Behr, *Prohibition: Thirteen Years That Changed America* (New York: Arcade, 1996); Thomas Coffey, *The Long Thirst: Prohibition in America, 1920–1933* (New York: Norton, 1975).

3. See for example, Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880–1920* (Chapel Hill: University of North Carolina Press, 1995); Thomas R. Pegram, *Battling Demon Rum: The Struggle for Dry America, 1800–1933* (New York: Dee, 1998). On the evolution of dry sentiment in the South, see Joe L. Coker, *Liquor in the Land of the Lost Cause: Southern White Evangelicals and the Prohibition Movement* (Lexington: University Press of Kentucky, 2007); Richard F. Hamm, "Southerners and the Shaping of the Eighteenth Amendment, 1914–1917," *Georgia Journal of Southern Legal History* 1, no. 1 (1991): 81–99.

4. John J. Guthrie, *Keepers of the Spirits: The Judicial Response to Prohibition Enforcement in Florida, 1885–1935* (New York: Praeger, 1998); Lawrence Spinelli, *Dry Diplomacy: The United States, Great Britain, and Prohibition* (Wilmington, Del.: Scholarly Resources, 1989).

5. On the role of the WCTU and women's politics in the South, see Anastatia Sims, *The Power of Femininity in the New South: Women's Organizations and Politics in North Carolina, 1880–1930* (Columbia: University of South Carolina Press, 1997), especially 54–79; Mary Martha Thomas, *The New Woman in Alabama: Social Reforms and Suffrage, 1890–1920* (Tuscaloosa: University of Alabama Press, 1992), especially 10–40.

6. Catherine Gilbert Murdock, *Domesticating Drink: Women, Men, and Alcohol in America, 1870–1940* (Baltimore: Johns Hopkins University Press, 1998). Caryn Neumann also makes this point in "The End of Gender Solidarity: The History of the Women's Organization for National Prohibition Reform in the United States, 1929–1933," *Journal of Women's History* 9, no. 2 (1997): 31–51. See also Kenneth D. Rose, *American Women and the Repeal of Prohibition* (New York: New York University Press, 1996).

7. Tanya Marie Sanchez, "The Feminine Side of Bootlegging," *Louisiana History* 41, no. 4 (2000): 403–33 (focusing on women bootleggers in New Orleans); Mary Murphy, "Bootlegging Mothers and Drinking Daughters: Gender and Prohibition in Butte, Montana," *American Quarterly* 46, no. 2 (1994): 174–94. Michael Willrich examines poor women's support of Prohibition in Chicago in "'Close That Place of Hell': Poor Women and the Cultural Politics of Prohibition," *Journal of Urban History* 29, no. 5 (2003): 555–74.

8. My research focused on Alabama, Georgia, and Florida, with some information on South Carolina, Louisiana, and Mississippi. Information appeared in a variety of places, including newspapers, state archives, and the U.S. District Court files for the southeast region, located at the National Archives and Records Administration facility in Morrow, Georgia (NARASE). State archives had varying amounts of information. Alabama's governors' papers were particularly rich, filled with letters from constituents and law enforcement officers, as were Alabama's clemency files. Georgia's clemency files were useful, but the governors' papers were scant. Florida did not centrally maintain papers from its governors until the late 1920s, nor did I locate clemency papers there.

9. James Benson Sellers, *The Prohibition Movement in Alabama, 1702–1943* (Chapel Hill: University of North Carolina Press, 1943), 120.

10. Murdock, *Domesticating Drink*, 89; Pegram, *Battling Demon Rum*, 152.

11. G. A. Ward to George Wickersham, November 9, 1929, Folders S–Z, Letters from Public Officials, Box 66, RG 10, National Commission on Law Observance and Enforcement, National Archives and Records Administration, College Park, Maryland (NARACP). The Wickersham Commission, officially known as the National Commission on Law Observance and Enforcement, was appointed by Herbert Hoover to report on the extent of evasions of Prohibition, its effect on society, and ways to promote more effective enforcement of Prohibition laws. The commission solicited information from the nation's governors, U.S. attorneys in the individual states, judges, law enforcement officers, and the public regarding perceptions of crime during Prohibition.

12. Murdock, *Domesticating Drink*, 42–69.

13. Tera Hunter, *To 'Joy My Freedom: Southern Black Women's Lives and Labors after the Civil War* (Cambridge: Harvard University Press, 1997), 164–65.

14. Respectability, especially in a society based on racial hierarchy, is a slippery concept. See Lisa Lindquist Dorr, *White Women, Rape, and the Power of Race in Virginia, 1900–1960* (Chapel Hill: University of North Carolina Press, 2004) 112–40; Sims, *Power of Femininity*; Thomas, *New Woman in Alabama*. For more on elite white women's struggle to remake themselves against the backdrop of southern culture and fluid notions of respectability, see Glenda Elizabeth Gilmore, *Gender and Jim Crow: Women and*

the Politics of White Supremacy in North Carolina, 1896–1920 (Chapel Hill: University of North Carolina Press, 1996); Anne Firor Scott, *The Southern Lady: From Pedestal to Politics, 1830–1930* (1970; Charlottesville: University Press of Virginia, 1995); Marjorie Wheeler, *New Women of the New South: The Leaders of the Woman Suffrage Movement in the Southern States* (New York: Oxford University Press, 1993).

15. Ada A. Brooks to President Herbert Hoover, May 31, 1929, Box 72, Letters from the Public A–B, Office of the Secretary to the Chairman, National Commission on Law Observance and Enforcement, RG 10, NARACP. Letters from the public are organized alphabetically by the last name of the correspondent. Of the thirteen boxes of letters from the public, I reviewed every other one.

16. Women of La Pine, Alabama, to Thomas Kilby, September 19, 1922, Governor Kilby Administrative Files, Folder 12, Box 22128, ADAH.

17. W. W. Callahan to Thomas Kilby, July 6, 1922, in ibid.

18. Anonymous to Bibb Graves, August 7, 1927, Alabama Governor (1927–1931: Graves) Administrative Files, Folder 17, Law Enforcement, SG 21164, ADAH.

19. Mary Mulat to Benjamin Miller, September 12, 1932, Alabama Governor (1931–1935: Miller) Administrative Files, Law Enforcement, SG 19935, ADAH.

20. Mrs. T. B. Spurgeon to Bibb Graves, June 23, 1935, Governor Graves Administrative Files, Folder 17, Law Enforcement, SG 21164, ADAH.

21. *Rosalind Green vs. James Roy Green*, Tuscaloosa County Court in Equity, Case 621. I located these records in the files of the Tuscaloosa County Courthouse, but they have since been relocated to the ADAH. Many states added habitual drunkenness or habitual intemperance to their grounds for legal divorce in the mid-nineteenth century. See Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (Berkeley: University of California Press, 1999), 77–79.

22. *A. A. Woods vs. Inez Woods*, Tuscaloosa County Court in Equity, Case 516, ADAH.

23. Mrs. Ira Champion to A. Heustess, July 1, 1929, Governor Graves Administrative Files, Folder 1, SG 21171, ADAH.

24. Mrs. Alexander Greet to Bibb Graves, February 15, 1929, Governor Graves Administrative Files, Folder 11, Special Files, SG 21177, ADAH.

25. Anonymous to William Brandon, April 14, 1923, Copy in Folder, "March–April 1923," Box 4, Denny Correspondence, W. S. Hoole Special Collections Library, University of Alabama, Tuscaloosa.

26. See Pegram, *Battling Demon Rum*, 175; Murdock, *Domesticating Drink*, 110–13.

27. "Day" to Sara Mayfield, April 8, 1924, Incoming Correspondence, Sara Mayfield Papers, Hoole Special Collections Library.

28. *State of Alabama v. Cadillac*, Case 1019, Tuscaloosa Circuit Court in Equity, ADAH.

29. *Rammer Jammer* 1, no. 1 (1924): 36, in Hoole Special Collections Library. For more on the nexus of college life, drinking and dating, see Lisa Lindquist Dorr, "Fifty Percent Moonshine and Fifty Percent Moonshine," in *Manners and Southern History*, ed. Ted Ownby (Jackson: University Press of Mississippi, 2007), 45–75. While many people assume that southern coeds were more conservative than their northern counterparts, research shows that students in Alabama consciously aligned themselves with national college culture so well described by Paula Fass in *The Damned and the Beautiful: American Youth in the 1920s* (New York: Oxford University Press, 1979).

30. See Governor Kilby Administrative Files, Folder 12, Box 22128, ADAH. Auburn University officials eventually assured the governor that the report was merely a vicious and unfounded rumor.

31. The numbers come from the Prison Docket books for the city of Birmingham. I examined four docket books: May 17–November 17, 1912 (5,970 cases), December 9, 1916–October 23, 1917 (6,020 cases), January 28–June 20, 1922 (5,000 cases), and June 1, 1926–October 21, 1928 (10,000 cases). Birmingham Public Library, Birmingham, Alabama (BPL).

32. Mattie Ellis, p. 88, Laura Champion, p. 315, Warden's Docket, May 17–November 12, 1912, BPL. Arrests were not identified by number in the 1912 docket book.

33. Entry 1469, Warden's Docket, Ensley Prison, June 1, 1926–October 21, 1928, BPL.

34. Entries 1824, 1825, in ibid.

35. Entry 5778, in ibid.

36. See Dorr, "Fifty Percent Moonshine."

37. Photo Inserts, Tom Gjelten, *Bacardi and the Long Fight for Cuba* (New York: Viking, 2008). See also Rosalie Schwartz, *Pleasure Island: Tourism and Temptation in Cuba* (Lincoln: University of Nebraska Press, 1997).

38. Schwartz, *Pleasure Island*, 46.

39. *U.S. v. Carmela Perez*, Case 241, Box 2, U.S. District Court—Southern District of Florida—Key West, NARASE. These case records usually contain only the indictment and the case jacket listing the outcome. The court decided not to prosecute Perez, though no reason was given.

40. *State of Florida v. E. H. Keese*, Case 318, Box 5, in ibid.

41. Affidavit of L. T. Bragossa, Deputy Collector in Charge, February 24, 1921, *U.S. v. Lucy A. Thistlewaite*, Case 191, Box 2, in ibid.

42. *U.S. v. M. A. Michaelson*, Case 353, D.O.W. to Customs Officials, December 30, 1928, Box 6, in ibid.

43. Information about Pearl Morales is contained in the documents researching John Damonte and his smuggling activities aboard the *Chiquita* (formerly the *Arsene J*), a well-known rum-running ship. See J. G. T. to O. D. Jackson, December 5, 1926, O. D. Jackson to W. E. Soltmann, December 31, 1926, Box 55, Correspondence of the Other Offices and Divisions of the Bureau, Prohibition Unit, Records of the IRS, RG 58, NARACP.

44. W.E.S. to B., December 4, 1926, Chiquita—Elizabeth J, Box 53, Information Files re: Vessels Suspected of Illicit Liquor Transport, 1926–27, in ibid.

45. Charles W. Root to H. J. Anslinger, October 10, 1929, Box 9, NC-31, Entry 297, Florida Seizures, 1929, Records of the Intelligence Division, 1922–1941, Records of the U.S. Coast Guard, RG 26, National Archives and Records Administration, Washington, D.C.

46. Testimony of Ella Carey, Trial Transcript, *U.S. v. J. H. Alderman, A. J. Aldocosta, Lefty Montgomery, Nick Santini, Godfrey Santini, and Walter Scott*, 20–21, Case 789, Box 7, Cases 760–857, Criminal Case Files, 1918–, U.S. District Court, Southern District of Florida—Tampa, RG 21, NARASE.

47. Testimony of Gregory L. Smith, Trial Record, *U.S. v. Alfred Staples et al.*, 39, Case 6180, Box 101, U.S. District Court, Southern District of Alabama-Mobile, in ibid.

48. Testimony of Mrs. Louis H. Williams, Trial Record, *U.S. v. B. L. Onderdonk et al.*, 25, Case 6220, Box 103, in ibid.

49. A. Becton, convicted in Dallas County, Alabama, in 1927; J. W. B. Blackenship, convicted in Coosa County, Alabama, in 1929; and Randall Bozeman, convicted in Crenshaw County, Alabama, in 1927. See Inmate Files Relating to Indeterminate Sentence Pardons, 1916–1939, Acerman–Haygood, Box SG 9672, Alabama Board of Pardons and Paroles, ADAH.

50. Administrative Files Relating to Parole, 1926–1941, Folder "Miscellaneous Letters—H," Box SG 8566, Alabama Board of Pardons and Paroles, ADAH. These files are organized alphabetically by the last name of the defendant. They often contain only a short form that lists the name, date of conviction, county of conviction, charge, and sentence. The files occasionally include some details about the reasons for engaging in illegal activity, though this section often was left blank. The prosecuting attorney and judge in the case also were encouraged to weigh in on the decision for parole. If such opinions were offered, they took the form of a letter to the governor or a notation on the case file.

51. Ibid.

52. Jim Barfield, Harvey Bannister, and Monroe Bailey, Petitions for Probation, Commutations, and Pardons, 1-4-42, Georgia State Archives, Morrow. Like Alabama, Georgia's clemency files are organized alphabetically by the last name of the convict.

53. *U.S. v. Love Johnson, Lizzie Johnson, and May Johnson*, Case 2429, Box 56, U.S. District Court, Southern District of Georgia—Macon, NARASE.

54. Inmate Files Relating to Indeterminate Sentence Pardons, 1916–1939, Hearne–Shortridge, Box SG 9673, Alabama Board of Pardons and Paroles, ADAH.

55. See Northside Prison Docket, January 28–October 11, 1922, BPL. Each docket book contains ten thousand cases. I examined the first five thousand, ending June 20, 1922. Alcohol-related charges included VPL (violation of the Prohibition laws), VLL (violation of the liquor laws), and being drunk. Birmingham police also charged people with driving an auto while intoxicated, but no women faced this charge in the period I examined.

56. Inmate Files Relating to Indeterminate Sentence Pardons, 1916–1939, Acerman–Haygood, Box SG 9672, Alabama Board of Pardons and Paroles, ADAH.

57. *Tuscaloosa News*, August 17, 1921.

58. *U.S. v. Pauline Nunnally*, Case 2402, Box 43, U.S. District Court—Eastern Division, Southern Division of Georgia—Savannah, RG 21, NARASE.

59. *U.S. v. Bertha Bly and Virginia Raspberry*, Case 777, Box 7, Cases 760–857, U.S. District Court, Southern District of Florida—Tampa, RG 21, NARASE.

60. *U.S. v. Mabel Matthews*, Case 794, ibid.

61. A "disorderly house" was a residential dwelling that posed a threat to public health, safety or morality, usually because it served as a gambling den, a drug den, or a house of prostitution.

62. Entries 5410, 8178, 8109, Warden's Docket, Ensley Prison, June 1, 1926–October 21, 1928, BPL. The Warden's Docket books record arrests in Birmingham, listing the date, time, name, address, arresting officer, race, charge and disposition of the case. Each large book contains space for ten thousand reports, which were entered in the order that they occurred.

63. Entries 6725, 6726, in ibid. Salina and Cleveland lived at the same address.

64. Not all docket books include information on race. Mobile's books list only the name, the charge, and any subsequent fine. Atlanta's docket books are similar. In the District Court collections for Macon and Columbus, all criminal cases are compiled together, and there is no compendium of dockets allowing a researcher to fully count cases as I did with Birmingham. My overall impression was that there were far fewer cases involving women in these Georgia cities than in Mobile or Birmingham. For these cities as well, court records also rarely indicate the race of the defendant.

65. There were 3,156 cases of charges of VPL, VLL, "drunk" or public drunkenness, and driving an automobile while intoxicated. Of those cases, 817 involved were listed as VLL while 2,339 involved charges of VPL, being drunk or driving under the influence. I did

not include disorderly conduct charges in my tally, though many of these might very well have involved liquor.

66. Under state dry laws, the percentage of women charged as a function of all alcohol cases dropped to 8.6 percent. In 1922, the number jumped to 18 percent, but it then returned to about 12 percent in 1926–28.

67. Black women ranged from a low of 53.8 percent of cases in 1912 to a high of 79.4 percent in 1917.

68. These numbers are drawn from Birmingham's warden's dockets documenting all persons arrested and brought to jail. I examined dockets for 1912, 1916–17, 1922, and 1926–28 (essentially cases in four representative docket volumes). Very few women, black or white, were arrested for drunk driving (four white women and three black women), a charge that suggested both consumption and income.

69. Sanchez drew a similar conclusion in her analysis of women bootleggers in New Orleans ("Feminine Side of Bootlegging," 406–7).

70. H. A. Pierce to Board of Pardons, May 13, 1930, "Letters Written Regarding Indeterminates" Folder, Box 8567, Alabama Board of Pardons and Paroles, Administrative Files, ADAH.

71. Murdock, *Domesticating Drink*, 90. Guthrie examines how Florida's courts approached searches for liquor violations and determined whether those searches violated the Fourth Amendment. He concludes that generally, the courts upheld the common law notion that "a man's home is his castle," prohibiting searches of private homes without clear and valid warrants. In cases in which it seemed reasonable for law enforcement officers to conclude that liquor in the home was intended for sale, however, courts were willing to mandate the intrusion into the home by the law. His evidence base focuses on appealed cases arising from Florida District Courts. See Guthrie, *Keepers of the Spirits*, 59–84.

72. Miscellaneous Convict Letters, J–K, Box SG 8567, ADAH.

73. Mrs. Harry Gordon Donald to Thomas Kilby, July 21, 1921, Governor Kilby Administrative Files, Folder 10, Box 22128, Law Enforcement, ADAH. The Alabama governors' files are a rich source for examining attitudes toward alcohol because they contain considerable correspondence from state residents outlining their concerns about alcohol and alcohol enforcement policy in their communities.

74. Anonymous to Thomas Kilby, October 30, 1921, Governor Kilby Administrative Files, Folder 10, Box 22128, Law Enforcement, ADAH.

75. W. M. Lackey to Thomas Kilby, July 29, 1921, in ibid., Folder 21, Box 22128.

76. Matthias Mahorner to Thomas Kilby, July 27, 1921, in ibid., Folder 20, Box 22128.

77. Thomas Kilby to Junius Pierce, July 30, 1921, in ibid.

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Race, Property, and Negotiated Space in the American South

A Reconsideration of Buchanan v. Warley

Patricia Hagler Minter

IN OCTOBER 1914, Charles Buchanan, a white real estate agent, and William Warley, an African American postal employee, began a real estate transaction that would end at the Supreme Court of the United States. On May 11 of that year, the city of Louisville, Kentucky, located on the Ohio River, the historic border between North and South, enacted an ordinance that prohibited white property owners from selling to African Americans if the property was located in a white neighborhood. Black leaders quickly mobilized to fight what they viewed as an assault on their equal protection and property rights. With the assistance of the National Association for the Advancement of Colored People (NAACP), the city's black leadership organized a local branch and formulated a legal strategy, finding a white property owner who would sell to an African American family, setting the stage for a test case of the residential segregation law. This case, *Buchanan v. Warley*, made it to the U.S. Supreme Court, which in 1917 unanimously struck down Louisville's ordinance as unconstitutional because it violated the rights of both blacks and whites to dispose of their property. Furthermore, it directly violated the Fourteenth Amendment's prohibition of interference with property rights except by due process of law.

This essay reconsiders *Buchanan* both in terms of its importance in American property law and of its impact on the southern law of segregation. It also analyzes the multiple meanings of this decision—its impact on the legal geography of race in one southern city, its value as a mobilizing force for black activists, and its significance as legal precedent. By examining local records of Louisville's black leaders, newspapers, national NAACP correspondence, and the case files from the lower federal and Supreme Courts, this essay takes a

fresh look at what historians have traditionally viewed as a stepping-stone to dismantling legalized racial separation in America.

Long interpreted merely as one phase of the march toward *Brown*, *Buchanan* received renewed interest from legal scholars starting in the 1980s. Benno Schmidt's pathbreaking 1982 article on the Supreme Court and race in the Progressive Era remains the starting point for scholars, and George Wright's 1985 study of Louisville's African American community provides valuable information about race and class formation in a New South border city. Later, David Delaney's *Race, Place, and the Law* utilized law and society methodology to show how segregationists used law to create "geographies of power." Michael Klarman and David E. Bernstein examined the *Buchanan* decision in a 1998 *Vanderbilt Law Review* forum. Introducing the colloquium, James Ely Jr. mused about why the decision has not garnered more attention from scholars, suggesting that "possibly, the dual nature of *Buchanan* has made it difficult for scholars to assess." The spirited discussion between Klarman and Bernstein speaks to that duality—that "*Buchanan* represents both the resolute defense of property owners' rights against regulation and the most significant judicial victory for civil rights during the early decades of the twentieth century."[1] Klarman contextualized several Progressive Era decisions involving race, arguing that because the U.S. Supreme Court invalidated residential segregation in *Buchanan* on substantive due process instead of equal protection grounds, its value as a civil rights precedent is dubious at best, a conclusion he amplified in his major study, *From Jim Crow to Civil Rights* (2004). In contrast, Bernstein argued that the NAACP owes its victory in *Buchanan* to the Court's *Lochner*-era individual-rights jurisprudence, which laid the groundwork for racial egalitarianism grounded in the laissez-faire tradition, a libertarian thesis that he applied to labor regulation in other contexts, most recently in his attempts to rehabilitate *Lochner* and freedom of contract theory into precedents and doctrines that ultimately guarded, not destroyed, individual rights. The work of Susan Carle has also shed light on the NAACP's legal strategies from 1910 to 1920, as has Risa L. Goluboff's study of civil rights lawyering in the pre-*Brown* world in which the meaning of civil rights was up for grabs, providing a new way to look at *Buchanan* and other "test cases."[2]

This essay accepts these calls to reevaluate this decision and attempts to place *Buchanan* in its legal-cultural context and to explain why this decision is important even though it does not fit the traditional narrative about civil rights history. Reevaluating *Buchanan* requires us to move beyond the di-

chotomies of property rights and equal protection that have dominated the conversation and have diminished the importance of the decision. *Brown v. Board of Education* it is not. But certainly this case is a stepping-stone on the path to that seminal decision, even if it does not occupy the same lofty perch as that and other landmark victories of the NAACP Legal Defense Fund in the 1940s and 1950s. *Buchanan* reminds us that there once was a time when equality of employment and economic justice figured just as prominently as equal access to public accommodations and public educational institutions not only in civil rights lawyering but also in popular perceptions about the meaning of equal justice under law. That time was the 1910s, and *Buchanan* became the young NAACP's second victory at the nation's highest court. In that context, perhaps what matters most about *Buchanan v. Warley* from a legal and cultural perspective is that it actually happened at all. This essay tells that story.

On November 14, 1913, W. D. Binford, superintendent of the mechanical department at the *Louisville Courier-Journal* and the *Louisville Times*, addressed the Real Estate Exchange of Louisville. Speaking to the luncheon crowd of fifty white businessmen at the Hotel Henry Watterson, Binford proposed the enactment of an ordinance "looking to the segregation of the negro and white races." In his address, Binford used the language of war to describe the racialized space of Louisville's urban geography, referring repeatedly to a "negro invasion" of white territory and the "aggression" of African Americans who purchased property to force out white owners. "There is no problem so grave, nor one fraught with so much danger to property values, as the gradual influx of the negro into blocks or squares where none but whites reside," Binford warned. "It is not necessary for me to inform you that this menace has cost the city many thousands of dollars in taxes, to say nothing of the loss of property owners." Using Baltimore's 1911 residential segregation ordinance and a decision by the Maryland Court of Appeals as his model, Binford suggested how Louisville could improve on Baltimore's law and at the same time avoid the appearance of "class legislation."[3]

Binford's proposal met with both concern and approval. Exchange president J. D. Wright, concerned that "such a law would make the negro rebellious," voiced his opposition to anything that "would be undue discrimination." Another real estate agent, J. E. Dawkins, spoke in favor of the proposal, saying "such a law would help the negro." A third concerned real estate agent declared that "the negro invasion of white residence blocks had done much to harm property values." Although a resolution concerning Binford's

proposal went down to defeat, the genie was out of the bottle. Within a month, a newspaper editorial campaign began in the pro-segregation *Louisville Times*, expressing support for Binford's proposal and repeating unequivocally, "The introduction of the negro in a residence section formerly occupied exclusively by whites undeniably has the effect of decreasing property values." The editorial then makes clear the editors' real concern: "The better class of white citizen does not want the negro as a neighbor. It means economic loss, and since social equality is impossible, a depreciated home value."[4]

In early 1914, Louisville's African American community started what became a vigorous counterattack.[5] The Reverend Charles H. Parrish, who later chronicled what he termed the "Louisville Segregation Case," described the need for organized resistance as an outgrowth of "a social situation in which forms of intimidation and humiliation were threatened, and even exercised, through proposed enactments by city ordinance or state legislation." On January 5, 1914, black Louisvillians, including Rev. Parrish and postal worker William Warley, held a meeting at Quinn Chapel African Methodist Episcopal Church, sanctuary of the most politically active black citizens, where they listened to a national organizer for the NAACP. The new Louisville branch organized that evening with fifty members representing the city's self-described "better class." They had one major purpose—to fight the residential segregation ordinance that was now before the City Council. Leaders of the newly formed branch representing the burgeoning black middle class visited the mayor to dissuade him from surrendering to an apartheid policy in a city previously characterized by polite racism.[6]

The contested space was Louisville's West End, a racially mixed section of the city. The city's total black population in 1910 was 40,522 (18.0 percent of the total population); by 1920, the number of African Americans had dropped to 17,158 (with a small decline to 17.0 percent of the overall population). Census data and evidence from city directories reveal that between 1880 and 1917, African Americans lived in residential areas throughout the city. While distinct black enclaves could be found, many city streets housed both blacks and whites, a situation urban policy analysts explain as typical of the practice of wealthy white employers keeping domestic workers in close proximity.[7]

Despite appearances of residential integration, blacks tended to concentrate near the central business district between 1870 and 1920. During the period of heavy European immigration, between 1840 and 1880, Irish and

German Catholics often found housing in close proximity to blacks. "Blacks and ethnic immigrants not only competed for the same residential space but also sought similar unskilled service and domestic positions in Louisville's labor market." Housing units in which African Americans resided were usually in very poor condition, and "housing for blacks during the postwar and immigration period was often unsanitary and dilapidated and considered to be a serious fire hazard." The city continued to attract immigrants, particularly Catholics, and by 1910 Louisville had 17,436 foreign-born whites, comprising 7.8 percent of the population.[8]

By 1910, African Americans began to move into the city's Near West Side, clustering in selected neighborhoods close to the downtown. Smoketown, Chestnut Street, the California District, and Walnut Street were predominantly black neighborhoods by then. Most of the black residents were poor; the black better class was small but highly visible; and the number of black churches, schools, and libraries had grown significantly since 1880. Historian George Wright has pointed out that a more significant piece of evidence is the remarkably mixed nature of many Louisville streets—"blacks and whites often lived on the same streets, and that some streets which had more blacks than whites in one given year did not necessarily become all-black streets." Approaching housing patterns with a less optimistic eye, however, Wright noted that the black better class was far more likely to live on an all-black block or near black businesses than were poor black or white people. Another common pattern was that whites and blacks might live on the same block but on opposite sides of the street. On Chestnut Street in the downtown area, whites often rented homes formerly occupied by African Americans.[9] The key word, however, is *rented*, suggesting that this fluidity is better explained by class status, transience, and poverty in particular than by any other factor.

A decisive shift took place between 1908 and 1910 as more black teachers, ministers, and businessmen purchased homes west of the downtown area. The local white population realized that black middle-class people were moving in significant numbers to the West End. The early movement of blacks into the area met strong resistance from the working- and middle-class whites living there. Until 1913, Louisville city officials had shown little interest in this shift, taking a class-based view and assuming that the costs of the housing market would dictate where black citizens could live. For the lower-middle-class whites who lived on the West End, however, the purchasing power of the black better class caused them to fear that their neigh-

borhoods would be overrun. By 1913, the West End Improvement League, a group of whites led by Binford, made it clear that it would campaign against any alderman who sympathized with black homeowners in this struggle.[10]

On March 18, 1914, the City Commission held an open forum to debate the segregation ordinance. Published reports from African American and white sources give differing accounts of the debate, although there is agreement that close to one hundred people attended, about 75 percent of them African Americans who opposed the ordinance. According to the Reverend Charles Parrish's published version, four NAACP branch leaders spoke on behalf of black Louisvillians, while three whites, "a lawyer, a minister, and a business man," presented the pro-segregation argument. Parrish described the debate as "a battle royal, full of pith and point, yet with a vein of good feeling on both sides quite commendable." He believed and claimed the press accounts agreed that "the colored speakers had the best of the argument." Surprisingly, a biracial coalition spoke against the measure—Real Estate Exchange president J. D. Wright argued that segregation laws were both a civic and an economic failure (echoing an argument long made by white-owned railroad companies on the subject of separate coach laws). He contended that there was no evidence that the "depression of values in West Walnut and West Chestnut sections has been caused by the occupancy of negroes," questioning the central claim of the ordinance proponents that the arrival of black homeowners in a white neighborhood automatically led to a decline in property values. Instead, Wright argued that the values were forced downward when large numbers of whites moved to the Highlands (the city's first streetcar suburb, near a large green oasis, Cherokee Park) or other new suburban sections. Inverting what would become the standard narrative of white flight in later decades, Wright argued that "white removal, not black arrival," drove down real estate values. Taking the pro-ordinance argument at face value, he also suggested that if the stated purpose of such a law was to prevent or reverse the decline of property values, the removal of blacks from certain areas might prove counterproductive, as "many whites would not rent in such an area," and the value of the properties would decline further. Former Exchange vice president Pink Varble, another white "real estate man of prominence," made an identical point in suggesting this law might be unnecessary.[11]

Class and economic interests clearly provided the subtext for the debate. Wright and those white real estate agents and businessmen who opposed the measure conducted business in more affluent areas of the city, many of

which were already protected by private restrictive covenants because they were owner-occupied properties, not rentals. Conversely, white real estate agents whose clients lived in more marginal areas serving primarily small white property owners, particularly white landlords, favored the ordinance.

The pro-segregation *Louisville Times* painted a different picture in its front-page coverage, although its account also reflected the class tensions underlying this issue. The news story described "well organized" black speakers who delivered "impassioned oratory of florid quality." The paper consistently depicted the pro-segregation white speakers as working-class men of unspecified profession; Parrish's account characterized the white speakers as professionals. Looking at both accounts, the evidence suggests that both class and racial geography determined which side of the debates whites took. Pro-segregation speaker Patrick Savage was described by the *Times* as a "laborer"—suggesting working-class status—while Parrish identified him as "a lawyer." More interestingly, however, Savage spoke as a member of the all-white West End Improvement League, claiming to represent five hundred white property owners. He and other white speakers, all from the same white neighborhood (predominantly working- and lower-middle-class) that increasingly attracted black buyers, focused on the depreciation of property values. One speaker, identified by the *Times* as a "white laborer," described the loss of much of his life savings in the form of his house because of the increasing black homeownership in his neighborhood. The desire to spread white privilege across class lines was very clear when "long-time real estate man Arthur Mueller" pointed out that in the city's most desirable properties and new suburban sections, "we provide that property may never be owned or occupied by negroes. But there are sections that cannot be protected, save by the enactment of an ordinance," so he urged the measure's passage.[12]

The *Times* account suggests that the "property value" argument (used as fear-mongering to supply a beard for racism and class tension) was visibly persuasive to the council members present. One white speaker argued that this law would allow white landlords to force out black tenants on "white" blocks so that incoming white tenants would pay higher rents. This suggests that fear of black ownership was not the major economic impetus behind the proposed ordinance. For some middle-class white businessmen, the desire to expand legalized segregation was clearly a motivation to go along with the West End white proponents. One speaker did not even pretend that market forces were the reasons for his support. Priest Frazier, a white real estate agent and partner in the Brand-Frazier Company, began

his remarks with some of the talking points of those who feared declining property values, but in closing, he ripped back the veil to show the racism underneath the thin veneer of market fears. "The whites and negroes are separated in schools and churches, railway coaches and hotels and theaters and such places. Why shouldn't they be separated in city blocks?"[13]

As the threat of mandated residential segregation loomed large, black grassroots activity against the proposed ordinance continued during March and April. Appealing once again to class, Rev. Parrish wrote a pamphlet "with a special appeal to the best thought of the whites" and distributed three thousand copies around the city. The NAACP branch sent Edwina Thomas, an African American woman, to the all-white Woman's Club, one of many influential organizations whose help was sought in the hope that the "better class" of whites would stop apartheid from coming to Louisville. Thomas and some white clubwomen "of influence" met with Mayor John Bushmeyer to denounce the bill. Warley and other NAACP branch members appeared before the influential Board of Trade seeking support from white business leaders in the hope that they would use their influence to stop the ordinance from coming up for a vote before the first level of city government, the Board of Councilmen.[14]

Despite this class-based strategy, on April 24 the Board of Councilmen (the lower house) approved the ordinance unanimously (21–0) and sent it on to the Board of Aldermen for consideration. Although the Board of Trade made a last-minute appeal to delay voting until that board and the greater business community had time to study the question and take a position, the aldermen turned down their request and approved the measure. On May 11, 1914, the mayor signed into law the ordinance disingenuously described as seeking "to prevent conflict and ill-feeling between the white and colored races in the city . . . and to preserve the public peace and promote the general welfare by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly for white and colored people, respectively."[15] The marketing of residential segregation to city officials was successful—racialized property law was now a fact. The title on pocket-sized copies of the city ordinance produced by the city for distribution was far more truthful, and its use after the fact is revealing: it was now "An Ordinance for the Segregation of the Races, by the Use of Separate Blocks for Residences and Places of Assembly by White and Colored People."[16] The bluntness of the title went where even separate coach and streetcar laws of the Jim Crow era dared not

go at the time—using the word *segregation* instead of hiding behind platitudes and legal fictions—but the references to both white and black people made it clear what the city's legal strategy would be if challenged in court.

As Binford had suggested in his speech before the city's real estate agents, the framers of the Louisville ordinance attempted to draft a law that would withstand a constitutional challenge under the Fourteenth Amendment's Equal Protection Clause (on which grounds Baltimore's first ordinance and a similar one in Winston-Salem, North Carolina, were invalidated) by claiming that the law applied equally to blacks and whites. As lawyers for the city of Louisville later argued before the U.S. Supreme Court, the ordinance was consistent with the "separate but equal" doctrine embraced by the Court in *Plessy v. Ferguson* (1896), and equal protection could mean identical penalties for black and white violators, a rationale the Court accepted in upholding Alabama's antimiscegenation law in *Pace v. Alabama* (1883).[17]

The geography of race was the key. The first three sections of the ordinance prohibited blacks from moving into predominantly white neighborhoods (defined as "blocks") and whites from moving into neighborhoods with "a majority" of black residents. The fifth section defined this standard more specifically—"fifty percent of current residents" determined whether a block would be defined as black or white. The fourth section exempted those already in residences prior to May 11, 1914, but mandated that a building owner on a white block as of that date could not sell or rent to a black occupant, nor could the reverse occur. However, this section contained one key exemption: "Nothing herein shall be so construed as to prevent the occupation of residences, places of abode or places of public assembly, by white or colored servants or employees of occupants of such residents, on the block on which they are so employed." The color line was flexible enough to bend for caste distinctions, but it was a solid unbreakable line when blacks dared to purchase property or reside in white blocks as equals to white residents. Sections 5 and 6 prohibited new construction by blacks on white blocks and vice versa, mandating that all applications for permits would be published in one English-language newspaper and one German-language newspaper (but not in an African American paper). Addressing the potential problem raised by new construction, section 6 also described how the racial character of a vacant block would ultimately be determined. The race of the group that would reside in a residential space or that would use the place of public assembly must be stated on the application for a building permit. Once built, the 50 percent rule applied on the block, "thus creating a method by which

a block which is vacant may be improved and by which its use by white or colored persons may be determined." This section ended, however, with the disclaimer that the ordinance "shall not be construed to abridge unlawfully any constitutional right which any owner of property may possess to use or occupy his property, subject to reasonable police regulations." This is the only mention of a reasonableness standard or the police powers of local authorities in the ordinance. The seventh section called for building inspectors to draft maps of all city blocks, indicating the racial geography of each block. The final section mandated a fine of "no less than five dollars and no more than fifty" for occupying a property in violation of the ordinance.[18]

"Defeated, though undaunted," Rev. Parrish wrote later, the Louisville NAACP "sought the intervention of the Courts." NAACP national field secretary May Childs Nerney, Executive Committee chair Dr. Joel Spingarn, and staff attorney Chapin Brinsmade came to Louisville and spoke at a rally held at Quinn Chapel Church, a fund-raising and organizing approach that the NAACP used during its early years. The meeting raised more than three hundred dollars to retain a local attorney to launch what both national and local officials agreed was the best strategy to defeat Jim Crow—a test case. For national NAACP officials, this case would be the linchpin of the effort to defeat residential segregation. Because of the attention to detail and the superficial compliance with the "separate but equal" standard of *Plessy v. Ferguson*, the Kentucky ordinance was technically the best drafted of all local segregation ordinances. If it was struck down, then it was likely that all other segregated housing laws would be invalidated. The stakes could not have been higher. "All other cases," Brinsmade told the assembly at Quinn Chapel, "will hinge on Louisville."[19]

The attack now moved to the courtroom. The NAACP challenged the ordinance in both criminal and civil courts, launching two separate test cases in rapid succession. The criminal case came first. On August 23, 1914, Arthur Harris, an African American, moved into a house at 630 Nineteenth Street—on a block designated white. Summoned to police court, Harris was found guilty of violating the new ordinance, and "the NAACP had its first case."[20]

To stage the civil suit, Charles Buchanan, a white real estate agent who opposed the segregation ordinance because of its implications for his business, agreed to sell a lot located on the corner of Thirty-Sixth Avenue and Pflanz Street (a white block) to William Warley. The African American postal worker would lose his job before the suit bearing his name was re-

solved. Although there were eight white houses on the block, the houses across the street from the disputed property were owned by African Americans. The contract that Buchanan and Warley signed contained an "escape clause"—if Warley was not permitted by law to take possession of the property, he would not have to pay for it. The setup was complete. As anticipated, Warley was prohibited from occupying the property; therefore, he invoked the escape clause, and Buchanan then filed suit in Jefferson County Circuit Court for "specific performance" on the contract. For the real estate agent to recover, the court would have to strike down the city ordinance that prevented Warley from completing the transaction.[21]

Legal scholar Benno Schmidt has argued that the setup was "too cute." Buchanan's lawyer, Clayton Blakey, was retained by the NAACP's fund-raising efforts, while Warley was represented by the Louisville city attorney Stuart Chevalier, a choice made deliberately, Blakey later stated, "in order that there might be no charge of collusion." Schmidt points to the unpublished dissent of Justice Oliver Wendell Holmes in *Buchanan*: "I cannot but feel a doubt whether the suit should be entertained without some evidence that this is not a manufactured case."[22] Blakey would not have disagreed with the justice, filing suit in Jefferson County Circuit Court on December 1, 1914. On the day before Christmas, the first decision validating the segregation ordinance came down in the criminal case of *Harris v. City of Louisville*. Judge James Gregory upheld the ordinance on the grounds that it upheld "a scrupulous regard for property" and that ownership of property was not absolute and fell within the police powers of the state. Furthermore, Gregory continued, he believed that the segregation question had been settled by the U.S. Supreme Court first in *Plessy* and then in *Berea College v. Kentucky* (1908), which affirmed the state's school segregation law in a private college.[23]

On April 3, 1915, the Jefferson County Circuit Court dismissed the civil case in *Buchanan v. Warley* and upheld the validity of the ordinance. The NAACP brought the two causes forward together on appeal, and both the *Harris* and *Buchanan* cases were decided by the Kentucky Court of Appeals on June 15. Unanimously upholding the segregation ordinance, the Court of Appeals validated the worst fears of Brinsmade and the other NAACP lawyers. Justice J. B. Hannah distinguished Louisville's law from those invalidated in Baltimore and Winston-Salem because of the section protecting vested rights existing at the time of its passage. Dismissing the plaintiff's contention that segregation of blacks and whites might prove an entering wedge for segregation of Protestants and Catholics or Republicans and

Democrats as "time-worn sophistry," the court replied that the *Plessy* decision had already answered this question. Finally, citing *Berea College*, the court ended on an overtly racist note: "The State is fully committed to the principle of the separation of the races whenever and wherever practicable and expedient for the public welfare."[24] Residential apartheid was therefore a "reasonable" use of the state's police powers.

The NAACP was now ready to take *Buchanan* to the U.S. Supreme Court. Although Blakey was a former Louisville city attorney, the national leadership believed that, to paraphrase Brinsmade, the group's entire legal strategy hinged on this case. Accordingly, national NAACP president Moorfield Storey of Boston would argue the case before the Supreme Court along with local counsel. As Carle has pointed out, the *Buchanan* case typified the early NAACP's legal strategy: national control of a test case, an engineered set of facts, and a white patrician lawyer to give the cause legitimacy before the high court. Storey had previously appeared before the Court on behalf of the NAACP in a grandfather clause case, *Guinn v. U.S.* (1915), which he won.[25]

With Storey and Blakey representing Buchanan and Louisville attorneys Chevalier and Pendleton Beckley arguing the pro-segregation side, the case came before the Court during the spring 1916 term with only seven justices sitting (the confirmation of Louisville-born Louis Brandeis was not yet complete and Justice William Day was missing from the Court as a consequence of illness). On April 17, Chief Justice Edward White scheduled the case for reargument before the full Court.[26] The reargument sent alarms through the Louisville NAACP branch, which again held fund-raisers, as did branches around the country, reflecting the national leaders' emphasis on winning this case.[27]

The Court heard rearguments during the October 1916 term, with counsel for both sides debating the "reasonableness" of Louisville's ordinance. Utilizing a strategy described both as "pragmatic" and as influenced by "sociological jurisprudence," Storey's brief made no mention of *Plessy*, refusing to challenge the "separate but equal" doctrine. Instead, Storey argued that the ordinance destroyed property rights without due process and abridged the privileges and immunities and equal protection guarantees of the Fourteenth Amendment. In fashion similar to Brandeis's famous brief in *Muller v. Oregon* (1908), Storey included a diagram showing the racial geography in a hypothetical white-designated block.

In so doing, Storey argued that the law was not a reasonable use of

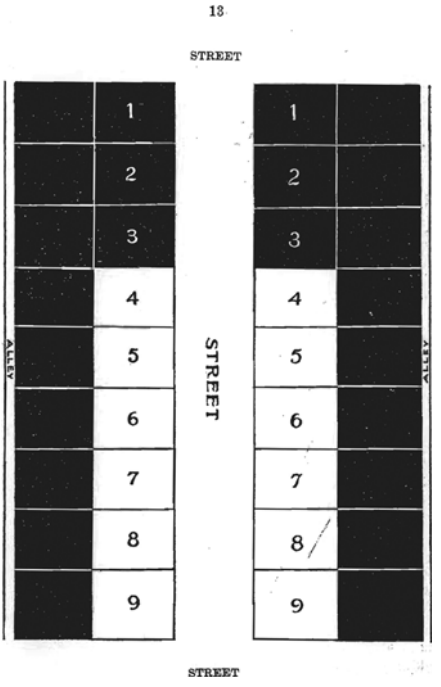

FIGURE 11. NAACP lawyer Moorfield Storey included this diagram depicting the racial geography of a hypothetical white block in Louisville in the brief he submitted to the Supreme Court. Courtesy Library of Congress.

police powers but instead created a situation in which "the ordinance operates to continue that occupation of a square by both white and colored people which its framers profess to consider dangerous." Furthermore, Storey pointed out that "a single transfer of property makes the division unequal, a use of premises which today is legal becomes a crime tomorrow." Storey concluded by using *Yick Wo v. Hopkins* (1886) to unmask a facially neutral law that was really "class legislation." "The question is," Storey argued, "whether a majority of the people dwelling in any locality may say to the minority, 'You shall not have the rights of other men to live where you please, but shall be limited to certain localities, not because you have violated any laws human or divine, but because you are what God made you and because we consider ourselves your natural superiors, no matter what our habits or our qualities, because our complexion is different.'" Reminding the Court that as in *Yick Wo*, "if they can be forbidden to live on their own land they can be forbidden to work at their own trade. If [the Fourteenth Amendment] does not protect the rights of all citizens, it does not protect the rights of any, since it knows no distinction of race or color."[28]

The lawyers arguing for Louisville's cause were no match for Storey. In sharp contrast to his skilled advocacy, Chevalier and Beckley's brief revisited their winning argument before Kentucky's high court, depending on *Plessy* and *Berea College* for authority as well as several liberty of contract cases. And in a bizarre reading of natural law, they suggested that the law was reasonable because it prevented "a few of each race from overstepping the racial barriers which Providence and not human law has erected"; the failure to respect these natural barriers would lead to "the most destructive consequences to the white man's property."[29] This argument flew directly in the face of *Yick Wo* and dropped all pretense that this ordinance was anything other than an apartheid policy that restricted contract and property rights.

When the Court handed down its decision on November 5, 1917, it was a unanimous victory for the NAACP attorneys, with Justice Oliver Wendell Holmes deciding to bury his dissent.[30] Although the city had cited both *Plessy* and *Berea College* in its brief as supporting the ordinance, the justices chose not to revisit the correctness of those decisions.[31] Instead, they took the option offered by Storey's brief: "The concrete question here is: May the occupancy, and . . . the purchase and sale of property of which occupancy is an incident, be inhibited by the states, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?" Writing for the Court, Justice Day held that "this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State." Day also expressed skepticism about the ordinance's stated intent to promote racial harmony through mandated residential racial separation: "Such action is said to be essential to the maintenance of the purity of the races, although . . . in the ordinance under consideration that the employment of colored servants in white families is permitted, and nearby residences of colored persons not coming within the blocks, as defined in the ordinance, are not prohibited." By making that statement, Day made it clear that the Court knew exactly what this ordinance was—or more accurately, what it was not. The real purpose of the Louisville ordinance was now unveiled. This was no "separate but equal" law, nor was it an attempt even to pretend that the city was doing anything to promote the general welfare. Instead, under the thin guise of state police powers, Louisville had established a racial caste system that restricted property rights. With that, the Court struck down the ordinance as a "direct violation of . . .

the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law."[32]

The *Buchanan* decision elated Louisville's African American community and filled it with hope. The *Louisville Leader*, a black paper, equated the decision "with the Emancipation Proclamation in importance." The *Leader*'s front-page article celebrated the defeat of the law that "attempted to revive the ill-famed ghetto" and predicted future triumphs, reporting that prominent black leaders believed "the action of the Court presages a complete reversal of the attitude of the country toward her Negro population."[33] For Louisville's black better class, property rights and equal protection were conflated—although the opinion did not mention "equal protection of the laws," the community believed wholeheartedly that the idea was there implicitly and that this decision was the entering wedge they needed to drive Jim Crow not only from Louisville but also from the nation.

A 1920 statewide report by the Commission on Interracial Cooperation made precisely this linkage. In the aftermath of the victory in the nation's highest court, a flurry of activism emphasized the importance not only of ending Jim Crow but also of improving blacks' economic status. The tone was hopeful. Describing the barriers that must be swept away to achieve racial uplift, the report's section on housing emphatically stated, "Segregation must be condemned, for purchase and sale must be free." After these limitations were gone, "the Negro must be taught to desire better things," although "a desire for education and for better living conditions does not mean a desire in the least for so-called social equality." But the following sections, which called for "economic justice," directly stated their goals—"We recommend equal wage for equal work regardless of color, race or sex as the principle of justice by which wages will be determined." The interracial committee's recommendations continued with a request that "the law requiring equal accommodations on railroads and other common carriers be enforced," leaving little doubt that progressive black and white Kentuckians conflated the victory in *Buchanan* with the expansion of equal rights and implicitly with the creation of group rights, well beyond the scope of the opinion's protection of individual property rights.[34]

The reaction from Louisville's white population was less ebullient. On the day after the Court handed down its decision dealing him a unanimous loss, the city attorney, Beckley, made vague comments to a Louisville newspaper that although he had not yet seen the full opinion, he hoped that the

ordinance could be revised "to find favor with the members of the Supreme Court." He added that "if the Supreme Court has held that the State has no right under its police powers to separate whites from blacks then we have to rest contented with the decision." Although that was not what quite what the Court said, its message about the limits of state police powers was clear and unanimous. Accordingly, Beckley and the city never tried to draft or to enact another ordinance.[35]

A letter from a member of one of Louisville's wealthy white families, the Speeds, shows clearly the entrenched racism and classism in elite southern white culture. Writing to his father, James Speed, from "somewhere in France," where he was fighting in the Great War, in late 1917, Second Lieutenant John Speed mentioned a letter he received from a school friend in Louisville: the younger Speed found it "hard to believe that people are in school back there." On the Western Front, any news from home carried with it a bizarre disconnection from the ghastly ever-present qualities of the Great War. But Speed's lengthy reaction to the Court's decision was revealing in other ways as well:

> I just noticed in today's paper that the case in the Supreme Court in regard to the ordinance on the segregation of Negroes in Louisville had been reversed. It also said that in all probability the "Jim Crow" cars would have to go in the near future in the South & of course the Negroes are citizens and all that but I really believe that it would be unwise to rush this to[o] much in the south until the negroes are educated and raised above their present standing. All I hope is that the darker citizens of Louisville will realize their position and not try to step beyond their limits on account of this action in their favor.[36]

The Speed family lived at 2013 Bonnycastle, in one of Louisville's most exclusive neighborhoods. Surely young John Speed was not concerned that African Americans would move suddenly into his elite neighborhood, a remote possibility at best even for the wealthiest black citizen on the West End. With the war still raging in Europe, one might think he would have greater worries than maintaining the racial status quo back home in Kentucky. His concern that the improvements in African American education, refinement, and class status that constituted "racial uplift" might not happen before the black assertion of full civil rights, however, reflects the very real fears of many southern whites in the wake of the *Buchanan* decision. For them, this decision was not about individual property rights, classi-

cal liberalism, or contracts but about the much-feared entering wedge that might transform race relations in the South. And African Americans hoped that the decision would be just such a wedge—the first blow on the way to tearing down the wall of segregation and inequality.

After the ordinance was overturned, many members of Louisville's black better class were immediately able to move into formerly white neighborhoods, although poorer African Americans remained trapped in deteriorating neighborhoods near "red-light districts," to use the language of the era's housing studies. A study commissioned by the liberal-leaning Women's Section of the Commission on Interracial Cooperation in 1920 revealed that almost 75 percent of Louisville's forty-five thousand blacks lived in substandard rental housing with structural problems, leaks, poor city services for water and garbage collection, and a high incidence of tuberculosis. The report compared black working-class rental housing "with that of the white working-man's home in a newly developed subdivision in which he is purchasing his property." The report noted new concrete sidewalks, green lawns, and fresh paint in the white neighborhood, a sharp contrast with black frame tenements "in the old section of the city" in which "two rooms houses a family" and "garbage, ashes, trash of every description are found in the yard." The report also suggested that given its large black population, Louisville belonged in a class with Detroit, Cleveland, and Pittsburgh instead of the other cities and towns in the predominantly rural and white state of Kentucky.[37] And as the movement for racial equality continued on multiple fronts over the next three decades, Louisville's African American population struggled against the persistence of segregated housing in much the same vein as those northern counterparts.

Although the exhilaration over the death of Jim Crow proved premature, as private residential covenants quickly replaced state-sanctioned legal segregation, economist William A. Fischel correctly points out that *Buchanan* prevented apartheid from coming to America.[38] This is a crucial point, reminding us why the case matters in the civil rights canon. However, as Kevin Boyle's heartbreaking narrative of the 1925 struggles of black physician Ossian Sweet and his family to live in a white Detroit neighborhood show, private restrictive covenants combined with white supremacist violence and intimidation threatened the courageous black families who dared to breach the color line. Such problems continued well past the Court's invalidation of private restrictive covenants in 1948's *Shelley v. Kramer*.[39]

Louisville once again became the testing ground for fair housing in 1954,

when Andrew Wade, an African American World War II veteran, tried to purchase a home in the "lilly-white suburbs" of Shively, south of the city. When *Shelley* was decided in 1948, restrictive covenants were in place for 75 to 80 percent of Louisville properties, just as white Louisville real estate agent Wright had predicted back in 1914 as part of his argument against the need for the housing ordinance. As Louisville and its suburbs grew outward, private covenants followed the white middle class, and the city's real estate brokers did nothing to comply with the Court's decision. Lending institutions continued their practice of redlining poor and predominantly black communities, defining the parameters of what ethicists Alan Anderson and George Pickering have termed "the metropolitan color line." But believing that the Supreme Court's decision in *Shelley* had opened the door "for one Louisville family struggling to realize the American dream of a 'home of one's own,'" Wade began to push against the confines of segregation and pursued the suburban ranch house to which he aspired, "where there is plenty of fresh air and space for children to play." In the wake of the *Shelley* decision, Wade discovered instead that "builders, real estate companies, and lending agencies all work together to enforce their own secret restrictive covenants and see that no Negroes move into neighborhoods they want to reserve for whites."[40]

With the help of white progressives Carl and Anne Braden, who bought the two-bedroom ranch house in the white-flight suburb on May 10, 1954, and then deeded the house to the Wades, Andrew Wade's dream was realized—for five days. When local whites saw the Wade family moving in, the seller tried to buy back the home. The Wades refused, and the violence against them began on May 15—cross burnings and rifle shots fired into the house, with police refusing to arrest the perpetrators. Two days later, the U.S. Supreme Court handed down their unanimous decision in *Brown v. Board of Education*. As threats of violence grew stronger in Louisville, the Wades still refused to sell. Supporters formed the militant Wade Defense Committee, which urged black and white Louisvillians to join the struggle because, "Their fight is your fight—because if democracy is denied to one, it is denied to all." On June 27, the Wade house was destroyed by a dynamite explosion. Though the Defense Committee pressed on, the city's black leaders ultimately split, as the local NAACP branch found the Wade Defense Committee's militancy, the potential for greater violence, and the possible "communistic" associations with white leftists such as the Bradens worrisome. The organization further distanced itself from the Bradens after they

were convicted of sedition in late 1955 in a case that showed the convergence of white supremacy and anticommunism and its potential for undoing the promise of civil rights.[41] The struggle was no longer unified, as it had been in 1917, and the "better classes" could no longer dream of future housing equality through uplift, as they had in 1920.

From 1940 to the present, Louisville and much of urban America have experienced increased residential segregation and racial separation, a larger reflection of the polarization of city and suburb "characterized by a black core and a white fringe." Almost a century has passed since Louisville's African American community and the NAACP won their case before the Court, invalidating the segregated housing ordinance. Not only did they strike a blow for property rights, but their labors laid the groundwork for equal protection on which future advocates would build. Yet the struggles of the movements for civil rights in metropolitan housing so well described by historians Thomas Sugrue and Matthew Lassiter remain ongoing.[42] Even today, a walk through Louisville's predominantly black (and mostly poor and working-class) West End serves as a powerful reminder that the convergence of race, class, and law early in the twentieth century continues to shape the racial geography and culture of the urban South.

In light of these continuing challenges to the quest for racial and economic justice, why should *Buchanan v. Warley* still matter to those who study civil rights and the fight for black equality in America? The road to equality proved much longer than the unanimous decision seemed to signal to African Americans and their allies in 1917. The short answer is that we should not allow the problematic language of the decision and the ongoing struggle for housing equality to obscure the decision's importance or its power. That the decision did not speak in the language of equal protection has certainly caused many scholars to diminish its importance in the civil rights canon prior to *Brown*. Nor did it provide African Americans with a broad statement that could be used in other contexts, as contemporary observers had hoped it would. But these shortcomings should not diminish the accomplishments of the coalition of local people and national civil rights organizers and lawyers whose work for racial and economic equality produced a result that offered hope that a new day for race relations was imminent. And the language the opinion used on the nature of property rights foreclosed any possibility that apartheid would come to America. Not even the boldest white supremacists tried to do so in the decision's wake, turning first to private restrictive covenants and later to violence against Wade

and other courageous souls like him. Racist whites chose these avenues of attack because they had no legal weapons left, and first *Buchanan* (and later *Shelley*) foreclosed those possibilities. Although the story of housing and economic equality remains unfinished, the contingent nature of history reminds us that had the decision gone the other way, the obstacles would have been even more daunting. *Buchanan v. Warley* is ultimately a saga about civil rights, an early and important step in the larger battle for racial equality, and reducing it simply to a victory for individual liberties and property rights misses the greater importance of this seminal case. The conflicted nature and multiple meanings of the *Buchanan* decision and its aftermath argue for its restoration to a major rather than minor part of the civil rights story, with new appreciation for its complexity.

NOTES

1. Benno Schmidt Jr., "Principle and Prejudice: The Supreme Court and Race in the Progressive Era: Part I: The Heyday of Jim Crow," *Columbia Law Review* 82, no. 3 (1982): 444–524; George C. Wright, *Life behind a Veil: Blacks in Louisville, Kentucky, 1865–1930* (Baton Rouge: Louisiana State University Press, 1985); David Delaney, *Race, Place, and the Law, 1836–1948* (Austin: University of Texas Press, 1998); James W. Ely Jr., "Reflections on *Buchanan v. Warley*, Property Rights, and Race," *Vanderbilt Law Review* 51, no. 4 (1998): 953.

2. While Bernstein, a libertarian scholar, celebrates "Lochnerization" as a victory for individual rights, Klarman takes a different approach, starting with the proposition that the Court is usually a majoritarian body, not a countermajoritarian force, as some scholars believe, particularly on civil rights issues. See David E. Bernstein, "Philip Sober Controlling Philip Drunk: *Buchanan v. Warley* in Historical Perspective," *Vanderbilt Law Review* 51, no. 4 (1998): 797–879; Michael Klarman, "Race and the Court in the Progressive Era," *Vanderbilt Law Review* 51, no. 4 (1998): 881.

Klarman put his thesis nicely in the following passage, "While laissez-faire constitutionalism may produce incidental benefits to the cause of civil rights, it is important not to confuse the former with the latter. That is, the relationship between laissez-faire constitutionalism and racial justice is contingent and contextual, not necessary and universal" (939). He elaborated in 2004 that libertarians have "overstated their case. . . . Not only are they mistaken in claiming that *Lochner*-like principles would have undermined Jim Crow, but those principles themselves condemn the civil rights legislation that has proved transformative." See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 82, chapter 2. By contrast, Bernstein continued the conversation that he began in the *Vanderbilt Law Review* forum, first in *Only One Place of Redress* (Durham: Duke University Press, 2001) and more recently in *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011), where he wrestled with *Buchanan* once more and again saw its protection of property "in the classical liberal tradition" as protecting genuine freedom. See Bernstein, *Rehabilitating Lochner*, chapter 5, 86. But see also Risa L. Goluboff, *The Lost Promise of Civil Rights*

(Cambridge: Harvard University Press, 2007), which also views *Buchanan* and other cases involving individual rights such as speech and property as part of a trend in which "the Court occasionally vindicated individual rights." But she also points out that in the pre-1912 cases involving Fourteenth Amendment rights of African Americans, civil rights lawyers lost twenty-two of twenty-eight cases (21). The evidence presented in this essay supports and expands Goluboff's and Klarman's arguments. My thinking on individual and group rights also owes much to Hendrik Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All,'" *Journal of American History* 74, no. 3 (1987): 1013–34. My conversations with Rob Riser on why *Buchanan* matters have also shaped my thinking about its place in the civil rights canon.

Susan D. Carle persuasively argues that by "staging confrontations to create facts for test cases," the elite white eastern lawyers who oversaw the NAACP's early legal strategies pushed the limits of professional ethics in the name of social justice while at the same time sitting on bar association boards that penalized "ambulance chasing" lawyers (frequently members of less elite groups) for similar conduct. The difference, according to Carle, was their perception of motive—"ethically pure," pro bono work to exact social change as opposed to income-producing, self-interested case manufacturing. See Susan D. Carle, "Race, Class, and Legal Ethics in the Early NAACP (1910–1920)," *Law and History Review* 20, no. 1 (2002): 97–146. See also Kenneth W. Mack, "Rethinking Civil Rights Lawyering and Politics in the Era before Brown," *Yale Law Journal* 115, no. 2 (2005): 256–354. Mack also criticized Bernstein for internalizing "court-centered legal liberal assumptions that have dominated civil rights histories" (n. 54).

3. "Mr. Binford on Segregation," *Louisville Times*, November 14, 1913.

4. Ibid.

5. "Segregation Is Mr. Binford's Topic," *Louisville Times*, November 14, 1913. This is also covered without an editorial comment in the *Louisville Courier-Journal*, November 15, 1913. The first full account of the planning and execution of the test case was a pamphlet published in 1918 by the Legal Committee of the Louisville branch of the NAACP. See Charles H. Parrish, *The History of the Louisville Segregation Case and the Decision of the Supreme Court* (Louisville: Louisville Publishing, 1918), in *Papers of the National Association for the Advancement of Colored People* (microform) (1982; Frederick, Md.: University Publications of America, 1996), pt. 12, reel 11. This story also appears in three secondary treatments of residential segregation cases. See Wright, *Life behind a Veil*, 119–20; Delaney, *Race, Place, and the Law*, 11–12. The earliest secondary account is Roger L. Rice, "Residential Segregation by Law, 1910–1917," *Journal of Southern History* 34, no. 2 (1968): 179–99, which describes Baltimore's 1911 ordinance but focuses on Louisville's test case.

6. Parrish, *History*, 6. On class formation and the social construction of the black "better class" in the New South, see Janette Thomas Greenwood, *Bittersweet Legacy: The Black and White "Better Classes" in Charlotte* (Chapel Hill: University of North Carolina Press, 1994); Glenda Elizabeth Gilmore, *Gender and Jim Crow: Women and the Politics of White Supremacy in North Carolina, 1896–1920* (Chapel Hill: University of North Carolina Press, 1996).

7. Scott Cummings and Michael Price, *Race Relations in Louisville: Southern Racial Traditions and Northern Class Dynamics*, Urban Research Institute Policy Paper Series (Louisville: University of Louisville, 1990).

8. Ibid.; Wright, *Life behind a Veil*, 102–18.

9. Wright, *Life behind a Veil*, 103.

10. Ibid., 119.

11. Parrish, *History*, 7–8; "Say Real Estate Values Will Be Stabilized by Race Residence Law," *Louisville Times*, March 21, 1914. On separate coach laws and the debate over Jim Crow railroad facilities in Kentucky and other areas of the South, see Patricia Hagler Minter, "The Codification of Jim Crow: The Origins of Segregated Railroad Transit in the South, 1865–1910" (PhD diss., University of Virginia, 1994).

12. "Say Real Estate Values Will Be Stabilized by Race Residence Law."

13. Ibid. This is also cited in Rice, "Residential Segregation by Law," 184. Rice is generally persuaded by the white working-class thesis, but my reading of the sources suggests that the class dynamics are more complex. Only the most elite whites opposed the ordinance, while middle-class real estate agents such as Frazier, whose clientele was more on the West End and less in the leafy streetcar suburbs such as the Highlands, supported apartheid with little pretense regarding market concerns.

14. Parrish, *History*, 6–8, 11; "Segregation Now a Law," *Louisville Times*, May 11, 1914.

15. Parrish, *History*, 6–8, 11; "Segregation Now a Law," *Louisville Times*, May 11, 1914. See also Delaney, *Race, Place, and the Law*, 112–13. Similar ordinances already existed in Richmond, Virginia; Baltimore, Maryland; Winston-Salem, North Carolina; and Atlanta, Georgia. St. Louis enacted its ordinance after Louisville. See Parrish, *History*, 11; Delaney, *Race, Place, and the Law*.

16. "An Ordinance for the Segregation of the Races, by the Use of Separate Blocks for Residences and Places of Assembly by White and Colored People," approved May 14, 1914, City of Louisville, Special Collections Department, Filson Historical Society (FHS), Louisville. The front-page byline in the *Louisville Times* also spoke the larger truth with no pretense of anything other promoting a caste system: "Segregation Act Signed," *Louisville Times*, May 11, 1914.

17. See Brief for Defendant, *Buchanan v. Warley*, in *Landmark Briefs and Arguments of the Supreme Court of the United States*, ed. Philip B. Kurland and Gerhard Casper (Arlington, Va.: University Publications of America, 1975). See also *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Pace v. Alabama*, 106 U.S. 583 (1883). In his brief for Buchanan, Moorfield Storey attempted to differentiate *Pace* from the Louisville ordinance, suggesting that "such marriage regulations are equal in their operation in the sense that no penalty is imposed upon the members of one race for doing what is lawful for the other race, whereas in the ordinance now in question the avowed object is to prevent negroes from occupying land which it is unlawful for whites to occupy." See Brief for the Plaintiff in Error, NAACP Papers, pt. 12, reel 11, 39.

18. "An Ordinance for the Segregation of the Races." The ordinance is also reprinted (without its revealing cover) in Brief for the Plaintiff in Error on Rehearing, *Buchanan v. Warley*, in NAACP Papers, pt. 12, reel 11, 2–7. Its prohibitions are also discussed in Wright, *Life behind a Veil*, although without any discussion of the servant exception or attempts at compliance with the "separate but equal" doctrine.

19. Parrish, *History*, 9; Rice, "Residential Segregation by Law," 185. On early NAACP lawyers and their legal strategies, see Loren Miller, *The Petitioners: The Story of the Supreme Court of the United States and the Negro* (New York: World, 1967); Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* (Philadelphia: University of Pennsylvania Press, 1983). See also Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina Press, 1987); Klarman, *From Jim Crow to Civil Rights*.

20. Rice, "Residential Segregation by Law," 185. The *Louisville Courier-Journal* identified John Miller as the first person arrested under the segregation ordinance, report-

ing on August 28 that Miller, an African American, had moved into a residence on Zane Street between Eleventh and Twelfth streets, a white block. Miller was arrested upon complaint of the city building inspector and fined five dollars. See *Louisville Courier-Journal*, August 28, 1914, 10.

21. Parrish, *History*, 9; Delaney, *Race, Place, and the Law*, 114–15; Carle, "Race, Class, and Legal Ethics," 127–28. Another account of the facts appears in George C. Wright, "The NAACP and Residential Segregation in Louisville, Kentucky, 1914–1917," *Register of the Kentucky Historical Society* 78, no. 1 (1980): 46–54.

22. Blakey quoted in Parrish, *History*, 11; Holmes's unpublished dissent is reprinted and discussed in Schmidt, "Principle and Prejudice," 512. See also Carle, "Race, Class, and Legal Ethics," for her analysis of the manufacturing of cases.

23. Gregory's opinion in *Transcript of Record: Buchanan v. Warley*, filed in U.S. Supreme Court, October Term 1916, 60–64. *Harris v. City of Louisville*, 165 Ky. 559 (1915), is the Court of Appeals ruling; the trial court ruling is not reported.

24. *Harris v. City of Louisville*. In 1915, the Court of Appeals was the state's highest court (the Kentucky Supreme Court was established by constitutional amendment in 1976). At this point, therefore, *Harris* could not be appealed and disappears from the story.

25. Carle, "Race, Class, and Legal Ethics," 127–28. On Storey, see Rice, "Residential Segregation by Law," 188; Susan D. Carle, "From *Buchanan* to *Button*: Legal Ethics and the NAACP (Part II)," *University of Chicago Law School Roundtable* 8 (Winter 2001): 281–311.

26. Contemporary observers and legal scholars generally agree that White wanted a full Court to decide such an important case. See generally Rice, "Residential Segregation by Law"; Schmidt, "Principle and Prejudice"; Bernstein, "Philip Sober Controlling Philip Drunk"; Klarman, "Race and the Court."

27. *Louisville Leader*, November 10, 1917, 1. The article gives a brief history of the staging of the test case and the fund-raising efforts of both the local branch and the national NAACP organization.

28. Brief for the Plaintiff in Error on Rehearing, *Buchanan v. Warley*, NAACP Papers, pt. 12, reel 11, 12–13.

29. Brief for the Defendant in Error, October Term 1915, *Buchanan v. Warley*, in *Landmark Briefs*, ed. Kurland and Casper, 105.

30. Klarman notes that Louisville's ordinance prevented the largest group of potential purchasers (blacks) from buying in mixed-race neighborhoods into which few whites would eagerly buy. Therefore, he concludes, "Even the committed majoritarian, Holmes, could not countenance such a substantial interference with property rights" (*From Jim Crow to Civil Rights*, 82).

31. "This court has held laws valid which separated the races on the basis of equal accommodations in public conveyances. . . . But in view of the rights secured by the Fourteenth Amendment to the Federal Constitution such legislation must have its limitations, and cannot be sustained where the exercise of authority exceeds the restraint of the Constitution. We think these limitations are exceeded in the laws and ordinances of the character now before us" (*Buchanan v. Warley*, 245 U.S. 81 [1917]).

32. Ibid., 75, 81, 82.

33. *Louisville Leader*, November 10, 1917, 1.

34. "Report of the Findings Committee of State Inter-Racial Conference Held on the Call of Governor Morrow," Louisville, July 23–24, 1920, Matthews Family Papers, FHS.

The Commission on Interracial Cooperation was founded in 1919 as an integrationist organization to promote interracial goodwill in the wake of the 1919 race riots. For more on the group, see Julia Anne McDonough, "Men and Women of Good Will: A History of the Commission on Interracial Cooperation and the Southern Regional Council, 1919–1954" (PhD diss., University of Virginia, 1993).

35. "Segregation Law Here Is Invalid," *Louisville Times*, November 6, 1917. The *Times* also ran an editorial lamenting the decision and what it meant for protecting white property values. The *Courier-Journal* ran a front-page story on the decision but made no editorial page comment.

36. John Speed to James Speed, [November 5, 1917?], John Speed Correspondence, November–December 1917, Speed Family Papers, FHS.

37. "Women's Section of Commission on Interracial Cooperation, Study of Negro Homes," 1–6, Matthews Family Papers.

38. William A. Fischel, "Why Judicial Reversal of Apartheid Made a Difference," *Vanderbilt Law Review* 51, no. 4 (1998): 953.

Defendant William Warley later led an unsuccessful battle to desegregate Louisville's public parks and bitterly denounced the local NAACP when it chose not to appeal to the U.S. Supreme Court in 1929. By the 1930s and 1940s, Warley had come to feel unappreciated by Louisville's black community for his sacrifices and efforts to achieve desegregation, and he increasingly lashed out in editorials published in the local black newspaper. He died suddenly in 1946. See Patricia Hagler Minter, "William Warley: A Leader ahead of His Time," in *One Hundred Americans Making Constitutional History*, ed. Melvin I. Urofsky (Washington, D.C.: Congressional Quarterly Press, 2004), 200–202.

39. Kevin Boyle, *Arc of Justice: A Saga of Race, Civil Rights, and Murder in the Jazz Age* (New York: Holt, 2004). See also Thomas Sugrue's recent synthesis of the broader civil rights struggle in the North, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North* (New York: Random House, 2008); Matthew D. Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* (Princeton: Princeton University Press, 2006), describes the post-*Brown* battles over housing segregation, court-ordered busing, and racial integration in Atlanta, Charlotte, and Richmond.

40. Wade Defense Committee, *The Wades . . . Their Right and Determination to Live in the House of Their Choice* (pamphlet), [1954], FHS. See also Alan B. Anderson and George W. Pickering, *Confronting the Color Line: The Broken Promise of the Civil Rights Movement in Chicago* (Athens: University of Georgia Press, 2008) for a broader discussion of real estate broker practices and financier redlining in metropolitan contexts.

41. Wade Defense Committee, *The Wades*; Catherine Fosl, *Subversive Southerner: Anne Braden and the Struggle for Racial Justice in the Cold War South* (2002; Lexington: University Press of Kentucky, 2006), 140, 154; the Wade case is discussed in detail in chapter 6.

42. Cummings and Price, *Race Relations in Louisville*. See also Sugrue, *Sweet Land of Liberty*; Lassiter, *Silent Majority*. In 1968, Kentucky passed a state Fair Housing Act (KRS 344), but perhaps more significant to the racial patterns in housing is the post-*Brown* struggle to desegregate schools. Louisville retreated to de facto school segregation in 1972, and its 1975 busing implementation was accompanied by violence. See Tracy K'Meyer, *Civil Rights in the Gateway to the South: Louisville, Kentucky, 1945–1980* (Lexington: University Press of Kentucky, 2010).

Race, Law, and Southern Public Higher Education, 1860s–1960s

Peter Wallenstein

DURING THE CENTURY from the 1860s through the 1960s—the hundred years after universal emancipation—the law of race and higher education in the U.S. South went through a series of substantial changes. In various configurations, three forces or groups lined up to shape the law of race and higher education in the region: (1) black southerners, (2) white policy makers in southern states, and (3) federal authorities (mostly Congress or the courts).[1] To be sure, none of the three groups can be assumed to be a monolith. White students, school administrators, alumni, politicians, and judges might be divided, among these subgroups or within them. Black applicants to white schools and black school administrators could differ. In the twentieth century, the Supreme Court's justices—keepers of the Constitution—diverged for a time from the executive branch and especially from Congress.

This essay tracks change and continuity in the law of race and southern public higher education across the hundred years from black freedom and citizenship in the 1860s through the legal and constitutional transformation of the 1950s and 1960s. It highlights some key features in the shifting legal and constitutional landscape of higher education. While paying due attention to the major markers of constitutional law with regard to race and higher education, it explores other dimensions of legal history as well. Congressional acts framed much of the law of race and public higher education. State statutory and other responses—whether to congressional legislation, judicial rulings, or the desires of black citizens—contributed a great deal to the shaping of higher education as well. On the ground, the South acted as a unit of information gathering and distribution. State governors consulted each other at major junctures of federal lawmaking, as did white university

presidents, and black administrators too no doubt huddled as news moved swiftly through their communities about new opportunities or rebuffs on the higher education front. Then individuals in each group had to decide whether and how to respond, adjusting to shifts in the law or seeking to make those changes.

Just as segregation in public *elementary* education characterized virtually every schoolhouse in the South from the post–Civil War dawn of public schooling, the "separate but equal" formula in *higher* education clearly preceded, and therefore could scarcely result from, the high court's 1896 ruling in *Plessy v. Ferguson*.[2] But *Plessy* served two important functions over the sixty years between 1896 and a 1956 decision that built on the 1954 and 1955 rulings in *Brown v. Board of Education*. First, *Plessy* thwarted attempts on constitutional grounds to secure a nonsegregation policy in higher education. Second, from the 1930s into the 1950s, *Plessy* supplied a target for black lawyers and litigants as they sought to chip away at the separate or seize more of the equal in the formula.

Regarding the rhetoric of race, this essay uses the shorthand of *black* and *white*. It does not consider how the laws defining *white* and *colored* differed from one state to another or could change from one time to another in any state. It does not speak of groups that were "nonwhite" yet not African American. Elsewhere I have written about how, during the half century before *Brown v. Board of Education*, Native Americans were white when attending the University of Oklahoma, Latinos might be white and attend the University of Texas, and people from various countries in Asia attended most "white" southern universities during the final decades of the Age of Segregation. In the 1920s, Japanese American Taro Kishi played varsity football at Texas A & M College, as did Art Matsu at the College of William and Mary. Right after World War II, Chinese Mississippians began freely attending their home state's "white" land-grant college and flagship university. So the great struggle took place over whether African Americans could cross over a boundary that put them outside the "nonblack" category in gaining access to what are often inappropriately termed "all-white" institutions of higher education.[3]

For reasons of space, this essay works within two other constraints. It cannot offer a systematic comparison of developments in the South and those outside the region, though such would be necessary to discern the particularities of patterns found in the South.[4] And it focuses almost exclusively on public institutions of higher education—"public" in the sense of

state-supported, not in the sense that they were open regardless of race or gender. So it cannot develop an alternative story line that tracks the role of public policy regarding race and private institutions.[5]

Race, Law, and Higher Education before Universal Emancipation

An examination of post–Civil War developments first requires a brief survey of conditions before the 1860s, when few opportunities in higher education existed for African Americans even in the North. In the 1830s, a New Hampshire academy, one-third of whose students were black, closed when whites tore the structure down or, rather, towed it away. During the same decade, white neighbors destroyed Prudence Crandall's famous effort at holding a school in Connecticut that black children might attend, and the voters of nearby New Haven blocked plans for a black college. Promoters had designed the institution to grapple with the very limited chances black youngsters had even to prepare for college, let alone gain admittance. During the same decade in Ohio, another private institution, Oberlin College, began to enroll a few African Americans, mostly in the preparatory department but increasingly in college classes as well, and by the Civil War had supplied opportunities for hundreds of both black and white students, including college graduates, many of whom put their training and spirit to work in the prewar North and then in the early postwar South. A school designed for African Americans, Ashmun Institute (today's Lincoln University), opened in Pennsylvania in 1854 and began offering college and professional degrees soon after the Civil War. Though patterns are not consistent, all of these institutions were private, and all were located outside the South.[6]

In the slave South, during the generation before the Civil War, various groups developed private schools for free black children in Baltimore. Maryland constituted a significant exception to a broader southern pattern in permitting free black children to attend private elementary or secondary schools, and even there, higher education remained out of the question until after the Civil War. The Georgia and Virginia legislatures banned formal instruction at any level for African Americans, with Georgia outlawing private instruction as well.[7] Nowhere did a southern state foster even segregated public schools that black residents might attend. And almost nowhere in the South could whites contemplate the likelihood that black and white residents—whether children, youths, or adults—might attend the same schools together

at any level. State support of colleges that were integrated—three attributes all together at once—seemed so highly unlikely almost everywhere in the 1850s South as to warrant no serious consideration.

By the mid-twentieth century, however, this combination of traits had long been found everywhere outside the South, and concerted efforts were under way to bring that constellation of features below the Mason-Dixon Line. Law was hardly the only force that shaped higher education in the South between the 1860s and the 1960s. But law is the key to generally distinguishing the South from the rest of the country, especially between 1890 and 1935, for in the South, state-enforced racial segregation was everywhere a matter of law. The South is where the formula "separate but equal"—however applied—most thoroughly shaped society and schooling, and segregation produced stark differences between black and white opportunities. Violence, custom, poverty, and policy might curtail black schooling in the North, but the states in that region did not, as southern governments widely did, make it a matter of law—even of criminal law—whether to permit black schools at all before the 1860s or to permit nonsegregated schools later.

The Morrill Land-Grant College Act of 1862: Launching Public Higher Education across America

In 1862, Congress passed the Morrill Land-Grant College Act. First proposed in December 1857 by Congressman Justin S. Morrill of Vermont, it made its way through the House and Senate by February 1859, only to be vetoed by Democratic president James Buchanan. Soon, however, the bill met with far less resistance. The secession of eleven southern states meant the departure of many of the congressmen and senators who resisted such an expansion of federal authority. Abraham Lincoln, the new Republican president, had fewer constitutional scruples about using the powers of the federal government to propel economic growth and social improvement. With a new law signed by Lincoln in July 1862, the federal government entered into the business of promoting higher education in every state.[8] However, this action took place months before the Emancipation Proclamation and years before the Fourteenth Amendment. It evidently did not anticipate issues of race—or, for that matter, gender. Its proponents envisioned young white men coming off farms and out of mills able to get some formal training that would promote their individual well-being and that of society.

In the North, some states moved quickly to take advantage of federal

support. By 1863, what had started out as the Agricultural College of the State of Michigan, a public school, became what is now Michigan State University, a land-grant school. In 1867, Illinois established a new institution, now the University of Illinois at Champaign-Urbana. Classes began at the new Maine State College in 1868.[9]

Gender swiftly emerged as an issue. Were women eligible to attend these schools? Could these schools legitimately exclude them? Year by year, state by state, the question elicited an answer—and then maybe a different answer. The first six male graduates of Maine State College picked up their degrees in 1872, the same year the school admitted its first female students. When classes began in 1874 at Indiana's new Purdue University, thirty-nine students were enrolled, a number that would have been larger except that the eight female applicants had all been rejected; the following year, however, the school reversed its policy and admitted women, too. Classes began in 1868 at New York's new land-grant school, Cornell University, with no applicant rejected on grounds of either race or gender. Admitted to Cornell in 1886 were two African Americans from Washington, D.C., Charles Cook and his cousin, Jane Datcher, who became the first black woman known to matriculate there.[10]

Similar considerations applied to northern state universities that were not land-grant schools. At the University of Michigan, gender (enrollment of white women) proved a greater obstacle than did race (enrollment of black men). The enrollment in 1868 of African Americans John Summerfield Davidson as a freshman and Gabriel Franklin Hargo as a law student went virtually unnoticed. By contrast, Madelon L. Stockwell's admission in 1870 as the school's first female student capped years of controversy. Michigan's first known black female student, Mary Henrietta Graham, enrolled in 1876 and graduated in 1880.[11]

As at Cornell and Michigan, other schools across the Northeast and Midwest sooner or later demonstrated their willingness to accept black applicants. Whether any such applicants were rejected on the basis of their race is uncertain, and the schools' general slowness was probably an artifact of the trickle of applications to these small new schools from state populations with typically tiny black proportions.

While these states, mostly in the Midwest, were at least enrolling and often graduating their first black students, the southern states were establishing their own segregated land-grant schools—mostly for whites only but in some cases for blacks only. For much of the decade following passage

of the Morrill Act, the states that had joined the Confederacy were either warring with the United States and thus ineligible to receive funds from the act or making their way through Reconstruction and waiting to have their representation readmitted to Congress. None was in a position to act appreciably before 1872. The early efforts in some states sputtered, but by the 1890s, the new programs were permanently in place.

Virginia provided one southern model for dealing with race. The great struggle in the legislature took place over which white school or schools to fund. In the end, the two leading candidates among many, the University of Virginia and the Virginia Military Institute, canceled each other out, and land-grant money began flowing to a new school in the western part of the state, Virginia Agricultural and Mechanical College, a school for young white men that received two-thirds of the land-grant funding. Since Virginia did not yet have a public black institution of higher education, the legislature directed the other third of the money toward a new private institution for black students, both male and female, Hampton Normal and Agricultural Institute.[12]

South Carolina also divided its land-grant money. In 1872, the legislature established the South Carolina Agricultural College and Mechanics Institute in Orangeburg, in close association with a black private institution, Claflin University. In a rare instance of biracial higher education in the nineteenth-century South, a year later South Carolina opened the state university's programs—undergraduate, professional, and a new preparatory academy—to black students and faculty as well as to whites. For the next four years, this unique experiment flourished, but it came to a sudden end in 1877. The black land-grant institution persisted. At the state constitutional convention of 1895, African American delegate Thomas E. Miller, a law graduate of the University of South Carolina in the 1870s, proposed to replace it with a new land-grant institution, also in Orangeburg. The new school would have only black students, and the faculty would all be "Southern men and women of the negro race." White leaders could support those racial and regional specifications. The next year, as a state senator, Miller proposed legislation to carry the constitutional provision into effect; when the bill passed the legislature, he resigned his seat to take up the presidency of the new Colored Normal, Industrial, Agricultural and Mechanical College of South Carolina.[13]

Elsewhere across the South, similar efforts were under way. In 1871, the Republican-controlled Mississippi legislature created a new public institu-

tion, the nation's first black land-grant school, Alcorn University, and apportioned to it three-fifths of Mississippi's proceeds under the Morrill Act, with the remainder going to a new program at Ole Miss. Rather than apportioning their land-grant money to a black school as well as a white one, other southern states—among them North Carolina and Delaware—established only one land-grant school and conferred on it all the new money. These states merrily went about their business, continuing as before to exclude all prospective black students from any historically white public institutions while doing nothing to make alternative arrangements for them. In Tennessee, black legislator Isaac F. Norris presented a petition in 1881 from a group of black teachers whose many complaints about the state government's neglect of black education included the charge that the land-grant money was going entirely to the University of Tennessee, for the education of white students, whereas the petitioners supposed that Congress had "intended that gift . . . for the whole people of Tennessee."[14] Segregation therefore existed virtually everywhere and at all times in the South, but it had two faces, very different, especially before the 1890s.

Even during what is generally thought of as the nadir of black status, power, and opportunity, governmental funding of black higher education in the South generally lurched forward. One significant impulse stemmed from the new public schools for black children—virtually all of them elementary schools at first, but later on secondary schools as well—in which, more and more, the teachers were black rather than white. Those teachers had to receive some training, somewhere. A very important additional catalyst for change came from the federal government, with new laws enhancing the funding and broadening the roles of the nation's land-grant schools, black and white. That legislation included the Second Morrill Act, passed in 1890, as well as laws from the 1880s and the 1910s regarding agricultural research, instruction, and extension for the benefit of both black citizens and white.

Separate but Equal in a World of Expanding Land-Grant Funds and Functions: The South's Colleges of 1890

Everyone won in what we might call the Compromise of 1890, the formula adopted in the Second Morrill Act, which offered substantially higher funding for each state's land-grant institutions but offered it on condition that

black students as well as white students benefit from the money. The two groups need not attend the same institution, however, provided the funds were "equitably divided" between "a college for white students" and an "institution for colored students"—language employed in recognition that the recipient black schools might not be at a collegiate level.[15]

Southern white educators (and politicians) could support the measure because it conferred much greater financial support for their institutions while safeguarding those schools from any calls for desegregation, in fact clearly indicating that Congress had accepted black exclusion from those schools. Black southerners could support the measure because it would reinforce their claims on black access to higher education and in many states would supply institutions that had not previously existed. White policy actors were in a position to see that little or no additional money, drawn from state budgets, would supplement the federal money going to black schools. From a black perspective, not much was a lot more than none at all. The 1890 measure did, as expected and intended, spur action in several states.

Across the South, what are termed the "colleges of 1890" (historically black land-grant institutions) are routinely distinguished from the "colleges of 1862" (the historically white land-grant schools). In fact, an excellent working definition of "the South" during the period under discussion in this essay identifies exactly those seventeen states that have both a college of 1862 and a college of 1890—the eleven states of the former Confederacy plus the Border South states of Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia.

Some of the colleges of 1890 were outright new institutions. Others were repurposed from earlier—as a rule, not much earlier—schools the state had set up. In North Carolina, the trustees of the white land-grant school acted promptly to assure their claim on the new money by arranging for black North Carolinians to benefit from the fund by attending a private institution, Shaw University, until the legislature could make more permanent plans. When the legislature next met, in 1891, it created an "A. and M. College of the Colored Race," a new institution that began operations two years later in Greensboro. Kentucky's State Normal School for Colored Persons, established shortly before the 1890 Morrill Act, suddenly received an infusion of new funds—14.5 percent of both the 1862 and the 1890 money. The white school did not lose any money when some of the 1862 fund was redirected to the black school because the new money from the 1890 act far surpassed the loss of a portion of the old, and, in accordance with the terms

of the 1890 Morrill Act, it kept climbing every year through the following decade.[16]

Over the years, Congress elaborated on the 1862 Morrill Act's foundations.[17] The 1890 act and its successor legislation greatly increased the resources available to the land-grant schools, broadened the range of activities for which that new money could be used, and promoted black land-grant colleges across the South, repurposing some schools and enhancing all the colleges of 1890.

Virginia Normal and Industrial Institute (VNII), established in the 1880s with normal and collegiate curricula, epitomized the significance of federal land-grant legislation for black schools in the South. In 1920, the state of Virginia redirected the land-grant designation and funds from Hampton Normal and Agricultural Institute, which had received both in 1872 in the absence of a public school for black Virginians. The land-grant designation brought VNII a combined income of twenty-seven thousand dollars a year from the 1862 fund, the 1890 fund, and subsequent legislation. As school president John M. Gandy some years later murmured happily, it became financially possible for his school to do something genuine about the "industrial" part of the institution's name.[18] Virginia divided the 1890 funds as well as the other new land-grant money, along the same lines as the original allocation in 1872, and in the 1920s, that money was switched from Hampton Institute to VNII. It ended up meaning far more even than new functions and new funds.

The school's new identity and programs led it to begin to develop as a full college, restoring an authority it had once enjoyed and then building on that. Gandy, a former student at Oberlin College and Fisk University, and the son of former Mississippi slaves, saw an opportunity that stemmed from the school's new land-grant status. Two decades after it had its collegiate wing clipped in 1902, he urged in 1922 what he called "the pressing necessity of reinstating College work at the Institute." As more black high schools began operations, the state needed more black teachers and principals with baccalaureate degrees. Moreover, the Morrill Act funds, he asserted, were intended for use at collegiate institutions, thereby implying that the white money might be in jeopardy if the black money was improperly spent. The 1917 Smith-Hughes Act overtly supported this type of initiative. President Gandy compared VNII with Virginia's four normal schools for white women: "We are asking for a teacher's college not a college of the arts and sciences." The state superintendent for public instruction approved the change, and

in 1925 three women each earned a bachelor's degree from VNII in history, science, or mathematics. President Gandy then began pushing for a new identity consistent with the school's new mission, and in 1930 the Virginia General Assembly agreed to a new name, the Virginia State College for Negroes. Newly designated a land-grant school, it became a black teachers' college as well. Federal legislation, state policy, and black agency at a segregated black institution came together to greatly enhance Virginia's new black land-grant school.[19]

Segregation, Equalization, and the Constitution: Institutional Progress and Prosperity within the American Apartheid System

In North Carolina during the Great Depression, Thomas R. Hocutt wanted to study pharmacy, and the state had a pharmacy school, but it was part of a white institution, and he was not white. Finding himself categorically excluded, he went to court, so in 1933 the matter of race, law, and public higher education overtly entered the realm of constitutional law in the South. In the end, Hocutt failed, in part because President James Shepard of North Carolina College for Negroes sought to safeguard his institution by refusing to release the undergraduate transcript that Hocutt needed to qualify for enrollment in the pharmacy school. But the question Hocutt raised would not go away, and his case signaled a new campaign by black southerners for equal rights in higher education under the Fourteenth Amendment. The *Durham Sun* pointed out two ways the state might address the questions Hocutt had raised: make space in an appropriate program in North Carolina, or pay black North Carolinians' tuition at some out-of-state school. Writing in the *New York Times*, Virginia newspaperman Virginius Dabney suggested that obtaining such tuition assistance might be what had motivated the suit, pointing out that black residents of Missouri had already achieved that outcome. Indeed, the president of the University of North Carolina reportedly leaned toward such tuition assistance. As for President Shepard, having protected his institution at trial and now moving ahead to benefit his school, he mused out loud about trying to establish departments of law and pharmacy at his institution, thus attaining greater equality within segregation—but of course, enhanced financial support would be necessary. The state soon began upgrading the North Carolina College for Negroes, and in 1939 the

school began new programs in law and other fields, with state assistance provided to qualified students to go north if no program yet existed.[20]

In the South, black citizens were simply barred from admission into many kind of programs, and Hocutt's suit did not change his exclusion. In 1935, Alice Jackson applied to do graduate work at the University of Virginia. Fifteen years earlier, the university had begun to permit white women to enroll in law, medicine, and other graduate programs, but it had done nothing to relax its ban on black Virginians, so Jackson received a polite refusal on the grounds that she was a person of color. She pursued the matter and in fact hoped that the National Association for the Advancement of Colored People would take up her case, as it had in Hocutt's litigation, but it did not.[21] Rather than desegregating a state university in the South, she, like Hocutt in North Carolina, inaugurated the era of "pre-desegregation" in Virginia—a divided world that persisted in the face of a determined effort to break down the walls of segregation.

Yet she immediately generated tremendous change. The Virginia state legislature and the state board of education promptly acted on three initiatives designed to take pressure off the university from prospective black applicants. The state authorized substantial new construction at Gandy's Virginia State College for Negroes. Moreover, at an institution that had only recently been reauthorized to grant undergraduate degrees, the state permitted new master's programs in education. Most black Virginians seeking advanced study were public schoolteachers who wanted to upgrade their knowledge and credentials, and a master's degree was increasingly being required to serve as principal, even of a black school. But that change would not address Jackson's needs, so the state created a new fund to assist black Virginians to go out of state to obtain entrance to programs such as Jackson sought. In 1936, the first year of the new opportunity, Alice Jackson enrolled at Columbia University, where she completed her master's in 1939.[22]

Also in 1935, Maryland citizen Donald Murray sought admission to the University of Maryland's school of law. A graduate of Amherst College, he knew that only race could keep him out of the Maryland school. He received and rebuffed an offer of state assistance to go out of state and sued for admission in Maryland. The trial judge, Eugene O'Dunne, sided with him. Especially at law school, where students emphasized the law of their own state, Murray could not obtain an equal opportunity in another state, and Maryland could shunt him to no black in-state alternative, so O'Dunne

ordered Murray's admission. Murray enrolled in the fall of 1935, forty-five years after the expulsion of the last two black students at the school brought to an end a brief period of nonsegregation in the late 1880s. The case was appealed to Maryland's highest court, which upheld the lower court. Murray graduated from Maryland's law school in 1938, and a few other black students also attended. That did not mean, however, that the University of Maryland was desegregated. In 1950, Murray, by then an experienced attorney, was arguing cases to break down the racial barriers in nursing and another graduate program. Had Murray lost in either court in the 1930s, his effort would have marked the beginning of a period of pre-desegregation in Maryland. Instead, his victory marked the beginning of a period of "proto-desegregation" characterized by black enrollment in one or more programs while all other programs continued to enforce the color bar.[23]

The news from Maryland may have influenced Lloyd Gaines, who applied to the law program at the University of Missouri in 1935. The state launched a tuition assistance program for black residents in 1928, and Gaines could have availed himself of such aid and gone to Kansas, Nebraska, Iowa, or Illinois; instead, like Murray, he sued for admission in his home state. Unlike Murray, however, Gaines lost, and when the Missouri Supreme Court upheld the lower court, Murray carried his case to the U.S. Supreme Court. Relying in part on the Maryland ruling, the Supreme Court ruled 6–2 against the Missouri courts' position that Missouri had done enough in offering to subsidize an out-of-state education.[24]

As the Court's ruling in the *Gaines* case told Missouri, the out-of-state option did not pass constitutional muster. Missouri must equalize in-state offerings, whether by permitting Gaines to study at the University of Missouri or by creating a program for black residents elsewhere in Missouri (most likely at Lincoln University, where Gaines had finished his undergraduate work). Few people actually see the ruling, even when writing about it, and it is written in exceedingly murky fashion, so it is often mischaracterized. One writer says, for example, that "in 1938 the United States Supreme Court, on appeal from Missouri courts, upheld the right of Lloyd L. Gaines to attend the University of Missouri Law School."[25]

The *Gaines* case offers a particularly apt instance of how pronouncements by appellate courts, even the highest in the land, offer little guidance regarding events on the ground.[26] Without an apparent ripple, other southern states continued to enact precisely the same sorts of programs for out-of-state scholarships as the Court had said did not satisfy the Four-

teenth Amendment's requirements for equal protection. As for whether *Gaines* opened the University of Missouri to black enrollment, not for another dozen years did the first black applicants gain admission—under a state court order, following further Supreme Court rulings.

World War II produced the 1944 GI Bill, a major new piece of federal legislation that caught the currents of 1940s America in terms of race, law, and higher education. The bill's higher education component fostered college attendance by countless veterans, most of them men but many women, most of them white but many black. Where could black southerners go to school? Improved as the region's institutions of higher education were compared with a generation earlier, they were nothing to write home about, and a majority of African Americans still lived in the South. Yet among the black southerners who made use of the GI Bill were members of a new civil rights generation. One of them, Floyd McKissick, soon launched successful litigation in federal court to break the racial barriers in the law school at the University of North Carolina, and he later joined the team that brought litigation to apply *Brown v. Board of Education* to the university's undergraduate programs.[27]

President Harry S. Truman embodied the federal government's emerging post–World War II commitment, as a matter of law and policy, to equal opportunity in higher education. Truman appointed the President's Committee on Civil Rights, had his Justice Department participate in the argument of Supreme Court cases on higher education, and in July 1946 appointed the President's Commission on Higher Education.

The Commission on Higher Education issued a report in February 1948 that captured key components of race, law, and higher education at what turned out to be the dawn of dramatic change. The majority expressly criticized racial discrimination in southern colleges and universities. Speaking of "racial and religious barriers" to equal opportunity, the commission gave as "the outstanding example" of these barriers "the disadvantages suffered by our Negro citizens." The report drew on both the Supreme Court's ruling in *Gaines v. Missouri* and the findings of the Committee on Civil Rights. Nowhere among the black schools in the seventeen segregated states could the commission point to "a single institution that approximated the undergraduate, graduate, and professional offerings characteristic of a first-class State university."[28]

Commissioners from states outside the South presented a united front, though their rhetoric and recommendations may have melded disparate

viewpoints. According to their report, "no fundamental correction" could be made in this serious problem until state segregation laws were repealed. The majority urged Congress to stipulate that there be "no discrimination in the channeling" of federal funds, though a companion phrase made it clear that segregation might be assumed, much as in the 1890 Morrill Act. As long as segregation remained the law of any southern state, "Negro institutions should by law receive their full proportionate share of all Federal and State funds destined for the support of college instruction." In other words, not only must southern states allocate the federal funds they received in an equitable fashion but—and this would be a huge innovation—they should be required to upgrade their support of black public institutions as a condition of receiving further federal funds. Black public institutions and their private counterparts must somehow be shored up, even as the commissioners recognized that such a recommendation certainly seemed "inconsistent" with their "position that segregation should be eliminated."[29]

Dissenting from the majority were the four commission members from segregated states—Deep South Georgia, Upper South Virginia and Arkansas, and Border South Missouri. In their view, all efforts toward improving educational opportunity "must, in the South, be made within the established patterns of social relationships, which require separate educational institutions for whites and Negroes."[30] These four men, too, presented a united front.

Mostly in response to black citizens' quest for admittance to historically white programs, southern states had in fact been moving toward a lessening of the region's stark historical inequality in funding support and curricular development. Much as Virginia had responded to Jackson's application to do graduate work at the University of Virginia, the state of Florida moved in 1949, when five black applicants sought admission to graduate and professional programs available only at the University of Florida. Rebuffed, they went to federal district court for redress. None gained entry to the white school, but within four years, Florida A & M College became Florida A & M University, complete with a law school and various other new programs.[31]

The Road to *Brown v. Board of Education* and Its Aftermath

A decade after the ruling in *Gaines*, the Supreme Court turned its attention back to higher education. Cases from Oklahoma and Texas led to 1948

and 1950 rulings on segregated access to law school and then against segregated facilities within an institution. Heman Marion Sweatt challenged the ad hoc law school that the state of Texas contrived to handle his quest for admission to the University of Texas Law School. The Court considered quantifiable measures such as the number of books in the library but then determined that no matter what such indexes demonstrated, a range of intangible factors forced the conclusion that no substitute school could match up with the one to which Sweatt had been denied admission.[32]

On the same day as the *Sweatt* ruling, the Court handed down a decision regarding George W. McLaurin's experience at the University of Oklahoma. When that state lost a case involving Ada Lois Sipuel Fisher's bid to attend law school, the legislature came up with a way to comply with the need to admit her while simultaneously complying with the letter of the law in Oklahoma requiring segregated seating. McLaurin faced signs clearly indicating which section of the library or the cafeteria was for "colored," and he had to sit just outside the room in which the other students attended class. Oklahoma was by no means the only state or school to jerry-rig this compromise, and the Court was not having it. Desegregated access was to be untrammeled. McLaurin could sit anywhere.[33]

In late June 1950, right after the U.S. Supreme Court had amped up the requirements of the Fourteenth Amendment, a Missouri state judge ordered the admission of three black applicants to the University of Missouri, one into a graduate program and the other two into an undergraduate program in engineering—the first African Americans ever to study at the university. That the institution was not yet desegregated despite the enrollment of one or more black students in specific programs—programs not available at Lincoln University, Missouri's black land-grant institution—is made clear by an internal memorandum that inquired of each subsequent black applicant that year and the program he or she sought, "Is it offered at Lincoln?" Rather, Missouri had joined a growing list of schools in the realm of proto-desegregation. In this way, black undergraduates continued to gain admittance to white institutions, especially in the Border South, if their home state had not (as South Carolina did) begun in-state black programs. This group of pioneers included Holloway Fields at the University of Kentucky in 1950, Hiram Whittle at the University of Maryland in 1951, and Glenn Wharton at Oklahoma State in 1953. All three went on to graduate.[34]

Brown v. Board of Education came in the wake of the cases on higher education decided in 1950. In some states and communities in the Border

South, it led immediately to at least nominal desegregation of elementary and high school classes. In other places, it met ferocious opposition, a strategy that reached its apex with Virginia's "massive resistance" plan.[35] Much the same can be said for public higher education. Several states ended their categorical exclusion of black applicants in either 1954 or 1955—in those states, *Brown*, whether *Brown I* in 1954 or *Brown II* in 1955, had an immediate impact in higher education. Others resisted into the 1960s. No campus desegregation at all came in Georgia, Mississippi, or South Carolina until 1961, 1962, and 1963, respectively.[36]

The facts of *Brown* all involved K–12 students and schools. States that were intent on making no concessions on K–12 segregation scarcely proved receptive to *Brown*'s possible application to higher education. North Carolina supplies the best example and the clearest resolution of continuing conflict over undergraduate desegregation, as that state and its flagship university challenged the notion that *Brown* had any bearing on higher education. In 1955, in the aftermath of *Brown II*, three black high school seniors applied to the University of North Carolina; when they were rebuffed on racial grounds, they took their case to federal court. There they won. *Brown* did indeed govern higher education, said the district court. In March 1956, the Supreme Court agreed.[37]

As with *Gaines* back in 1938, little happened as a consequence of the Supreme Court's ruling in the North Carolina case—at least in other states, where it was disregarded. But it meant that the three black undergraduates at Chapel Hill could remain, and it also led to the immediate enrollment of black undergraduates at the state's white land-grant school and its white women's college. Beyond that, the University of North Carolina case is an extremely important marker of how much had changed over the years. *Plessy*'s interpretation of the Fourteenth Amendment had died in yet another arena. After 1956, no longer could any state institution constitutionally exclude qualified applicants to any higher education program on grounds of race. By the early 1960s, such institutions as the University of Tennessee and the University of Virginia had changed their ways, permitting black enrollment in ways unrestricted by race, as Tennessee began admitting black undergraduates and Virginia began letting black undergraduates major in programs other than engineering. The era of proto-desegregation, with its anomalous presence of black students on still-segregated campuses, was drawing to an end.[38]

In the late 1940s and throughout the 1950s, the federal courts had done the heavy lifting in bringing about an end to categorical exclusion of African Americans from historically white institutions of higher education. In the 1960s, that changed, as Congress and the office of the president signed on in support of desegregation. In 1961, civil rights activists knew the federal government had at last come around to support desegregation rather than segregation of interstate travel when the Kennedy administration intervened to provide some protection for Freedom Riders in the Deep South. The same held true the following year when federal troops were deployed to secure James Meredith's enrollment as the first African American at Ole Miss.[39] In 1963, President John F. Kennedy called on Congress to pass his civil rights bill. The next year, President Lyndon B. Johnson obtained enactment. Public institutions could no longer lawfully discriminate. At the elementary, secondary, and higher levels, public educational institutions would no longer be either all-black or no-black as a matter of law. In constitutional and legal terms, the world of *Plessy v. Ferguson* was no more. Its handiwork remained, however, more or less intact.

Epilogue—Climax and Anticlimax

The years between 1935 and 1965 brought a series of steps toward racial integration in higher education. Federal and—in Maryland and Missouri—state courts launched proto-desegregation, the first actual changes. From Truman to Kennedy and Johnson, presidents sometimes took the lead, and Congress signed on in 1964. Changes in federal law, including reinterpretations of the Fourteenth Amendment, were clearly the prime movers in most cases of the beginnings of college and university desegregation, but other institutions also had authority over educational developments—accrediting agencies, professional associations, national foundations.[40] Black proponents of progressive change on the racial front—whether as applicants, litigants, and lawyers or as voters, state legislators, or members of Congress—continued to be critical to the emergence of nonsegregation as the new norm.

In some states between 1935 and 1955, students in such areas as law, medicine, and engineering gained admittance because the programs they wanted were not available at in-state black institutions. By the mid-1960s, the presence of black students on historically white campuses reflected an all-purpose admissions policy that no longer made space on an otherwise

still segregated campus only for one or two individuals. The conflict associated with the court-ordered entrance of the first black students to the University of Georgia in 1961 or the University of Mississippi in 1962 brought a violent climax to the white resistance to any desegregation. By 1965, with far less fanfare because there had been far less violence, the beginnings of change had come to every state, and by 1968, those beginnings had reached perhaps every public four-year institution. Undergraduates could gain admission regardless of their intended major, and they could live on campus. The federal courts and Congress had done their work, and southern white public opinion and politicians' stances had adjusted. The litigation of the two decades after World War II had worked its way through resolution and implementation, and federal legislation of the mid-1960s had completed the process of inaugurating campus desegregation.

By 1966, the absolute resistance at Deep South schools had come to an end, as had proto-desegregation at Upper South and Border South institutions. Every flagship state university had enrolled its pioneer black student, as had all the colleges of 1862. Not only could undergraduate applicants gain admission into each school, but no longer were their curricular options restricted to programs unavailable at in-state black institutions. Thus, in 1963, James Meredith graduated in political science from the University of Mississippi, as did Charlayne Hunter in journalism and Hamilton Holmes as a premed student at the University of Georgia.[41]

The process did not, to be sure, end there. Still to come at most historically white southern schools were black players representing their institutions in intercollegiate sports.[42] Black faculty would later teach biracial classes on such campuses, and black administrators eventually would help run such institutions. But by 1970, the South had begun to approximate the patterns of higher education outside the South. And both South and North continued to move ahead on the racial front, at least for a time.

In the late 1960s, the U.S. Department of Health, Education, and Welfare had a powerful tool at hand—the Higher Education Act of 1965. The Civil Rights Act of 1964 spoke of withholding federal funds, but in 1964 such federal funds were few. National Science Foundation grants had already begun to nudge schools toward enrolling black students, but with work-study, student loans, construction funds, and federal research contracts at risk, some further change was certain. Developments in the late 1960s found many institutions enhancing their efforts to enroll black students and hire their first

black faculty. No longer could institutions satisfy desegregation by such gestures as stating in small print that all applicants would be reviewed according to criteria other than their racial identities. A black racial identity often came to be viewed as a positive asset.

The legal history of race and higher education hardly came to an end with the 1960s. For one thing, the legal tools for propelling change attracted opposition on constitutional grounds. Could affirmative action pass constitutional muster? And what was the place of historically black institutions in an era of color-blind constitutionalism and supposedly desegregated systems of public higher education? For that matter, how desegregated were historically white schools? The use of race-specific incentives to attract black students to predominantly white campuses, such as the South's colleges of 1862, became more difficult. Meanwhile, proponents of public black colleges, the colleges of 1890, argued that, properly understood, *Brown* did not call for an end to such institutions. Blacks and whites alike could support enhanced resources for black institutions, whether to upgrade opportunities for African Americans, entice white students to black campuses, or deflect black students from white campuses.[43]

In the half century after the 1960s, nearly all institutions of higher education across the South continued to demonstrate the persistence of their historical patterns of enrollment and hiring, yet much had changed. The United States in general and the South in particular had gone through three quite different—and overlapping—regimes: (1) hostility or at best indifference; (2) grudging and separate or partial access; and (3) nominal fully equal access. Old patterns of categorical exclusion became things of the past. New possibilities, new patterns of life on college campuses, had emerged. The North had to change a great deal to get to the new situation of the 1960s. The South had to change a great deal more.

During the 1950s and 1960s, developments in federal law prodded considerable change in southern states, often against great resistance. When an institution had long refused to enroll any black students, most white southerners saw the admission of even one African American as anathema. Later, considerably larger black enrollment, though typically small in terms of statewide population figures, came to be seen as insufficient. Through changing constitutional and legal contexts, black agency had worked on multiple fronts—maneuvering through the law, challenging it, bringing about change in it. Federal law shaped the growth of higher education in varying ways.

White authorities in the southern states did so as well, but they also had to respond to some degree to black agency and federal law. Law in its various incarnations reflected society, but it also changed society and education. By the 1970s, the law of race and higher education in America had moved light years from the 1850s.

NOTES

1. An example of this approach is Peter Wallenstein, "Higher Education and Civil Rights: South Carolina, 1860s–1960s," *History of Higher Education Annual* 23 (2003–4): 1–22.

2. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

3. Peter Wallenstein, "Did Homer Plessy Die a White Man? Race and Southern History—The State of the Field," *Georgia Historical Quarterly* 94, no. 1 (2010): 62–96; Peter Wallenstein, "Identity, Marriage, and Schools: Life along the Color Line/s in the Era of *Plessy v. Ferguson*," in *The Folly of Jim Crow: Rethinking the Segregated South*, ed. Stephanie Cole and Natalie Ring (College Station: Texas A & M University Press, 2012), 37–53.

4. Examining several institutions outside the South during the Jim Crow era is Richard Melvin Breaux, "'We Must Fight Prejudice Even More Vigorously in the North': Black Higher Education in America's Heartland, 1900–1940" (PhD diss., University of Iowa, 2003).

5. In broad terms, private institutions tracked the history of law, race, and public institutions. Tennessee targeted nonsegregation in 1901 at Maryville College; better known is Kentucky's 1904 Day Law aimed at Berea College. These and scattered other private institutions began to desegregate in the 1950s. Beginning in 1964 and 1965, changes in federal policy nudged all private institutions away from racial discrimination.

6. Philip S. Foner, "Prudence Crandall," in *Three Who Dared: Prudence Crandall, Margaret Douglass, Myrtilla Miner—Champions of Antebellum Black Education*, ed. Philip S. Foner and Josephine F. Pacheco (Westport, Conn.: Greenwood, 1984), 3–54; Davison M. Douglas, *Jim Crow Moves North: The Battle over Northern School Segregation, 1865–1954* (New York: Cambridge University Press, 2005), 12–60 (for the New Hampshire incident, see 43–44); Roland M. Baumann, ed., *Constructing Black Education at Oberlin College: A Documentary History* (Athens: Ohio University Press, 2010), 1–66; Hilary J. Moss, *Schooling Citizens: The Struggle for African American Education in Antebellum America* (Chicago: University of Chicago Press, 2009); Horace Mann Bond, *Education for Freedom: A History of Lincoln University, Pennsylvania* (Lincoln University, Pa.: Lincoln University, 1976), 226–56, 429–48; Russell W. Irvine, *The African American Quest for Institutions of Higher Education before the Civil War: The Forgotten Histories of the Ashmun Institute, Liberia College, and Avery College* (Lewiston, N.Y.: Mellen, 2010).

7. Moss, *Schooling Citizens*; Diane Batts Morrow, *Persons of Color and Religious at the Same Time: The Oblate Sisters of Providence, 1828–1860* (Chapel Hill: University of North Carolina Press, 2002); Josephine F. Pacheco, "Margaret Douglass," in *Three Who Dared*, ed. Foner and Pacheco, 55–95; Heather Andrea Williams, *Self-Taught: African American Education in Slavery and Freedom* (Chapel Hill: University of North Carolina Press, 2005), 203–13, appendix containing state laws to curtail education for free blacks or slaves.

8. Williamjames Hull Hoffer, *To Enlarge the Machinery of Government: Congressional Debates and the Growth of the American State, 1858–1891* (Baltimore: Johns Hopkins University Press, 2007), 14–62; Roger L. Williams, *The Origins of Federal Support for Higher Education: George W. Atherton and the Land-Grant College Movement* (University Park: Pennsylvania State University Press, 1991), 1–39.

9. Peter Wallenstein, *Virginia Tech, Land-Grant University, 1872–1997: History of a School, a State, a Nation* (Blacksburg, Va.: Pocahontas, 1997), 16–19; Roger L. Williams, *Origins of Federal Support*, 40–86.

10. Wallenstein, *Virginia Tech*, 18; Andrea G. Radke-Moss, *Bright Epoch: Women and Coeducation in the American West* (Lincoln: University of Nebraska Press, 2008); http://www.news.cornell.edu/stories/Oct09/blacksCU.mw.html (accessed July 20, 2011).

11. Elizabeth Gaspar Brown, "The Initial Admission of Negro Students to the University of Michigan," *Michigan Quarterly Review* 2, no. 4 (1963): 233–36; http://bentley.umich.edu/exhibits/umtimeline/diversity.php (accessed July 20, 2011).

12. Peter Wallenstein, *Cradle of America: Four Centuries of Virginia History* (Lawrence: University Press of Kansas, 2007), 224–27.

13. The university revamped racial criteria but not gender, as only men enrolled at the university proper; however, a state normal school, established that same year on the university campus to train teachers for the new black elementary schools, was coeducational. See Wallenstein, "Higher Education and Civil Rights," 5–9. See also Pamela Mercedes White, "'Free and Open': The Radical University of South Carolina, 1873–1877" (master's thesis, University of South Carolina, 1975); W. Lewis Burke Jr., "The Radical Law School: The University of South Carolina School of Law and Its African American Graduates," in *At Freedom's Door: African American Founding Fathers and Lawyers in Reconstruction South Carolina*, ed. James Lowell Underwood and W. Lewis Burke Jr. (Columbia: University of South Carolina Press, 2000), 90–115. Responding to the few attempts during Reconstruction to desegregate higher education in the South, whites generally boycotted the schools or legislatures declined to fund them. See William Preston Vaughn, *Schools for All: The Blacks and Public Education in the South, 1865–1977* (Lexington: University Press of Kentucky, 1974), 103–18. In the late 1880s, after Maryland had finally begun permitting African Americans to practice law, the law school admitted and even graduated two black students, but that experiment, much like South Carolina's earlier one, soon came to an end, with a change of policy and the expulsion of the next two blacks to enroll. See David Skillen Bogen, "The First Integration of the University of Maryland School of Law," *Maryland Historical Magazine* 84, no. 1 (1989): 39–49.

14. Wallenstein, *Virginia Tech*, 45–46; Joseph H. Cartwright, *The Triumph of Jim Crow: Tennessee Race Relations in the 1880s* (Knoxville: University of Tennessee Press, 1976), 108–9.

15. Roger L. Williams, *Origins of Federal Support*, 123–56.

16. Wallenstein, *Virginia Tech*, 76–77; Joel Schor, *Agriculture in the Black Land-Grant System to 1930* (Tallahassee: Florida A & M University, 1982), 47–149.

17. Quite aside from the 1890 supplementary Morrill Act, Congress gave the system new obligations and opportunities. First came the Hatch Act of 1887 and its experiment stations—laboratories for applied science in agricultural production. Later legislation included the Nelson Amendment to the Appropriations Act of 1907; the Smith-Lever Act of 1914, which brought an extension program to each land-grant school (in the South, divided between the black school and a black constituency and the white school and white farmers); and the Smith-Hughes Act of 1917, which brought the training of male

teachers of agriculture and female teachers of home economics to land-grant schools along with high school programs in agriculture and home economics. See Roger L. Williams, *Origins of Federal Support*, 87–126; Schor, *Agriculture*.

18. Grace Vernell Hill Norbrey, "A Study of the Development of the Land-Grant Program at Virginia State University" (EdD diss., George Washington University, 1983), 18–44.

19. Wallenstein, *Cradle of America*, 262–65.

20. Virginius Dabney, "North Carolina Has Negro Student Row," *New York Times*, April 2, 1933; Neal King Cheek, "An Historical Study of the Administrative Actions in the Racial Desegregation of the University of North Carolina at Chapel Hill, 1930–1955" (PhD diss., University of North Carolina, 1973), 20–69; Glenda Elizabeth Gilmore, *Defying Dixie: The Radical Roots of Civil Rights, 1919–1950* (New York: Norton, 2008), 255–90; Augustus M. Burns III, "Graduate Education for Blacks in North Carolina, 1930–1951," *Journal of Southern History* 46, no. 2 (1980): 195–217.

21. Peter Wallenstein, *Blue Laws and Black Codes: Conflict, Courts, and Change in Twentieth-Century Virginia* (Charlottesville: University of Virginia Press, 2004), 60–75; Larissa M. Smith, "Where the South Begins: Black Politics and Civil Rights Activism in Virginia, 1930–1951" (PhD diss., Emory University, 2001), 74–108.

22. Wallenstein, *Cradle of America*, 310–11.

23. Peter Wallenstein, ed., *Higher Education and the Civil Rights Movement: White Supremacy, Black Southerners, and College Campuses* (Gainesville: University Press of Florida, 2008), 2, 26–29.

24. Mark V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925–1950* (Chapel Hill: University of North Carolina Press, 1987), 70–77; Robert McLaran Sawyer, "The Gaines Case: Its Background and Influence on the University of Missouri and Lincoln University" (PhD diss., University of Missouri, 1966), 152–97; *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). See also Jean L. Preer, *Lawyers v. Educators: Black Colleges and Desegregation in Public Higher Education* (Westport, Conn.: Greenwood, 1982), 31–57; Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 148–52, 160–62.

25. "Education of Negroes Tested by New Ruling," *New York Times*, December 18, 1938; George Brown Tindall, *The Emergence of the New South, 1913–1945* (Baton Rouge: Louisiana State University Press, 1967), 561. A more recent example is Bruce E. Baker, *What Reconstruction Meant: Historical Memory in the American South* (Charlottesville: University of Virginia Press, 2007), 102. See *Gaines v. Canada*, 353.

26. On distinguishing between constitutional principles as voiced in appellate rulings and actual developments on the ground, see Martin J. Sweet, *Merely Judgment: Ignoring, Evading, and Trumping the Supreme Court* (Charlottesville: University of Virginia Press, 2010).

27. Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: Norton, 2005), 102–41; Suzanne Mettler, *Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation* (New York: Oxford University Press, 2005), 136–43; Edward Humes, *Over Here: How the G.I. Bill Transformed the American Dream* (Orlando, Fla.: Harcourt, 2006), 215–54; Peter Wallenstein, "Higher Education and the Civil Rights Movement: Desegregating the University of North Carolina," in *Warm Ashes: Issues in Southern History at the Dawn of the*

Twenty-First Century, ed. Winfred B. Moore Jr., Kyle S. Sinisi, and David H. White Jr. (Columbia: University of South Carolina Press, 2003), 284, 288–89.

28. President's Commission on Higher Education, *Higher Education for American Democracy: A Report* (Washington, D.C.: U.S. Government Printing Office, 1947–48), 1:32, 2:31 (also published as *Higher Education for American Democracy: A Report of the President's Commission on Higher Education* [New York: Harper, 1948]).

29. Ibid., 2:35–36.

30. Ibid., 2:29n.

31. Lawrence A. Dubin, "Virgil Hawkins: A One-Man Civil Rights Movement," *Florida Law Review* 51, no. 5 (1999): 913–56.

32. Amilcar Shabazz, *Advancing Democracy: African Americans and the Struggle for Access and Equity in Higher Education in Texas* (Chapel Hill: University of North Carolina Press, 2004), 34–113; Gary M. Lavergne, *Before Brown: Heman Marion Sweatt, Thurgood Marshall, and the Long Road to Justice* (Austin: University of Texas Press, 2010); *Sweatt v. Painter*, 339 U.S. 629 (1950). Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1976; New York: Knopf, 2004), provides a masterful examination of the higher education cases on the road to *Brown*.

33. Ada Lois Sipuel Fisher with Danney Goble, *A Matter of Black and White: The Autobiography of Ada Lois Sipuel Fisher* (Norman: University of Oklahoma Press, 1996); George Lynn Cross, *Blacks in White Colleges: Oklahoma's Landmark Cases* (Norman: University of Oklahoma Press, 1975); Preer, *Lawyers v. Educators*, 63–121; *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637 (1950).

34. Wallenstein, *Higher Education and the Civil Rights Movement*, 22–33, 201–2, 266–69.

35. A sampler of the literature is Clive Webb, ed., *Massive Resistance: Southern Opposition to the Second Reconstruction* (New York: Oxford University Press, 2005).

36. Wallenstein, *Higher Education and the Civil Rights Movement*, 41–50.

37. Wallenstein, "Desegregating the University of North Carolina," 280–300; *Board of Trustees of the University of North Carolina v. Frasier*, 350 U.S. 979 (1956).

38. Wallenstein, *Higher Education and the Civil Rights Movement*, 33–41, 45–47.

39. Regarding the legal battles on the road to the enrollment of pioneer black students at three Deep South institutions, see Robert A. Pratt, *We Shall Not Be Moved: The Desegregation of the University of Georgia* (Athens: University of Georgia Press, 2002); Charles W. Eagles, *The Price of Defiance: James Meredith and the Integration of Ole Miss* (Chapel Hill: University of North Carolina Press, 2009); E. Culpepper Clark, *The Schoolhouse Door: Segregation's Last Stand at the University of Alabama* (New York: Oxford University Press, 1993).

40. Clarence L. Mohr and Joseph E. Gordon, *Tulane: The Emergence of a Modern University, 1945–1980* (Baton Rouge: Louisiana State University Press, 2001), 135–38.

41. Wallenstein, *Higher Education and the Civil Rights Movement*, 33–50.

42. Barry Jacobs, *Across the Line: Profiles in Basketball Courage—Tales of the First Black Players in the ACC and SEC* (Guilford, Conn.: Lyons, 2008); Charles H. Martin, *Benching Jim Crow: The Rise and Fall of the Color Line in Southern College Sports, 1890–1980* (Urbana: University of Illinois Press, 2010).

43. On such matters, see Preer, *Lawyers v. Educators*, 189–222; William A. Link, *William Friday: Power, Purpose, and American Higher Education* (Chapel Hill: University of North Carolina Press, 1995), 249–366; Shabazz, *Advancing Democracy*, 138–217;

Dwonna Goldstone, *Integrating the Forty Acres: The Fifty-Year Struggle for Racial Equality at the University of Texas* (Athens: University of Georgia Press, 2006); Albert L. Samuels, *Is Separate Unequal? Black Colleges and the Challenge to Desegregation* (Lawrence: University Press of Kansas, 2004); Barbara A. Perry, *The Michigan Affirmative Action Cases* (Lawrence: University Press of Kansas, 2007).

The Southern Roots of the Reapportionment Revolution

Charles L. Zelden

IN JULY 1961, only thirteen states had constitutional or statutory rules requiring the apportionment of the upper houses of their legislatures to be based on population alone; for the lower houses, the number stood at just twelve. An additional seven states mandated that their upper houses take population figures into account but allowed for "minor" variations based on other factors—there were only four additional corresponding provisions for the lower houses. All other states based their apportionment schemes on geographic factors such as county lines or town and regional groupings, used other nonnumerical standards such as taxes paid, or placed specific proportional limitations on the amount of representation that any one town, county, or region could receive no matter what its population.[1]

In actuality, the situation was even more inequitable than suggested by a review of the laws on the books. Most states using numerical reapportionment rules allowed significant population disparities between legislative districts—as much as 25 percent or more. Worse yet, the failure of many of those states using numerical apportionment to regularly reapportion their seats (in some states, the legislature had not redrawn its legislative boundaries in fifty years or more) meant that variations among districts had grown over time. The result was a near-universal system of disproportionate legislative apportionment in the United States, with some districts overrepresented and others underrepresented. In some states, the disparity in apportionment was extreme, with a mere 20 percent or less of the state population electing a majority of that state's legislators. In other states, closer to 50 percent of a given state's population elected a majority of the legislators, and in

a few states a slim majority of the electorate had a say in electing the majority of seats in the legislature. Yet no state had anything close to true numerical equivalence between legislative districts based on population.[2]

This malapportionment dilemma pitted the nation's growing urban and suburban centers against its declining rural sectors. Frustrated by the relative lack of political power that their numbers should have brought them, urban reformers had waged an ongoing campaign since the start of the twentieth century to force the redistribution of legislative seats to approximate more closely the population realities then in force. Overall, their efforts proved fruitless. Most paths to reapportionment, constitutional or statutory, required the consent and active support of the existing legislative bodies. Not surprisingly, these bodies—chosen under the existing system of *un*representative apportionment—proved unwilling to support changes that would have produced radical transformation of their membership (and cost many sitting legislators their seats). Efforts to force change through the courts proved equally fruitless. State judges often were willing to address the issue and even on occasion to invalidate inappropriate apportionment plans, but they lacked the will or the power to force real change on recalcitrant legislatures.[3] Federal judges—even in those instances where they acknowledged that a violation of the spirit of the Fourteenth Amendment had occurred—generally avoided the issue by invoking the "political question" doctrine, which forbade federal courts from ruling on questions best left to the "political" branches of government.[4]

This impasse began to erode in 1962, when the U.S. Supreme Court held in *Baker v. Carr* that the federal courts had a role in resolving the problem of legislative apportionment. "The mere fact that the suit seeks protection of a political right," explained Justice William J. Brennan Jr. for the majority, "does not mean it presents a political question." If anything, "the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision."[5] Over the next three years, a series of rulings by the Court built on the foundation that the justices laid in *Baker*; *Gray v. Sanders* (1963), *Wesberry v. Sanders* (1964), and *Reynolds v. Sims* (1964) each held that the Constitution demanded the application of a numerical standard for apportionment—generally expressed as one person, one vote. "Legislators represent people, not trees or acres," explained Chief Justice Earl Warren for the majority in *Reynolds*. "As long as ours is a representative form of government, and our

legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. . . . Full and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature." The "fundamental goal" and "plain objective" of the Constitution was the application of the "easily demonstrable" standard of one person, one vote (or, at least, "an honest and good faith effort" on the part of the state to reach that goal). "Modern and viable state government needs, and the Constitution demands no less," Warren concluded.[6] Later rulings made clear the Court's commitment to implementing this seemingly clear numerical standard, even where the application of the one person, one vote benchmark proved procedurally or politically difficult.[7]

National in scope and consequence, the Supreme Court's reapportionment decisions brought significant political change throughout the nation. To some extent, every state in the Union was affected by the one person, one vote requirement as numerical apportionment of legislative districts became the accepted—and required—norm. The result was a significant transfer of political power from the small towns and farms of rural America to the cities and suburbs of urban America.[8]

Beneath this national narrative of urban/rural conflict, however, the development of the reapportionment decisions had a distinctly regional flavor. The South played an important, even pivotal, role in shaping the reapportionment debate and the political and jurisprudential revolution it wrought in American political life. It was no coincidence that all the lead cases at the outset of the reapportionment revolution came from the South. Reapportionment may have seemed to some simply a fight between whites in the cities and whites on the farms—and on one level, it was—but underlying that fight was the issue of race. Embedded in the national narrative of urban/rural conflict were persistent, multivariant strands of cause and effect emanating from the white South's decades-long campaign to disenfranchise African American citizens. These efforts shaped not only the issues argued but also the strategies adopted, the answers found, and the eventual reactions to the changes wrought by law. Race and the South's struggle over it thus shaped the substance and development of the more dominant generic issues posed by the challenges of reapportionment.

The South's experiences with race-based disenfranchisement affected the

reapportionment debate and revolution in four distinct ways, each growing out of the fight over African American civil rights. The first was the scope of opposition to the concept of a population-based apportionment scheme. Some of the most inequitable and egregious instances of malapportionment could be found in southern states, as could dramatic examples of state legislatures' unwillingness to reapportion. Issues of race, in turn, shaped this opposition as much as if not more than urban/rural competition among whites. Second was the development of litigation strategies applied in reapportionment lawsuits; early successful efforts in the federal courts by African Americans to combat disenfranchisement provided a litigation model that white advocates of reapportionment quickly adopted. Third was the jurisprudential transformation wrought by race-based cases decided by the nation's highest court, changes that helped to reshape that Court's approach to reapportionment. The Supreme Court's rulings in such race-based cases as *Smith v. Allwright* (1944), *Brown v. Board of Education* (1954), and *Gomillion v. Lightfoot* (1960) not only had a direct educative effect on a number of the justices but also provided jurisprudential cover for the justices as they adopted and then enforced the highly controversial one person, one vote standard.[9] Moreover, the race cases of the 1940s and 1950s also taught justices clear and troubling lessons about the enforcement difficulties associated with sweeping constitutional rulings, and these lessons proved equally relevant to the Court's reapportionment remedies. Fourth, the American people's relatively quick acceptance by the end of the 1960s of the one person, one vote standard had its roots (at least in part) in the ongoing fight against race-based disenfranchisement in the South and that region's negative reaction to the enactment and enforcement of the Voting Rights Act of 1965. Ironically, one unintended consequence of the Supreme Court's reapportionment rulings, at least with respect to black voting clout, was that it led southern whites to champion reapportionment and the one person, one vote standard in defense of race-based vote dilution.

Taken together, these strands of cause and effect never fully controlled the reapportionment debate in its entirety but combined to shape the form and structure of reapportionment in the 1960s and beyond. Although the need for legislative reapportionment would have been present had the South's peculiar racial tensions not existed, the Supreme Court's response to this need—and the reactions of the nation to this response—would no doubt have taken a very different form.

The Southern Sources of Opposition to Reapportionment

Malapportionment occurs when legislative districts are noticeably unbalanced with regard to size and political influence. Though examples of such malapportionment could be found nationwide, some of the most inequitable and even egregious instances of malapportionment occurred in southern states.[10] In Georgia, for example, a "county unit" system (distributing legislative seats so that counties of differing sizes received a set number of seats no matter their actual populations) gave rural districts with their smaller population totals a greater influence than their voting numbers would have indicated. As a consequence, Atlanta, with 12.6 percent of Georgia's population in 1940, voted for only 1.5 percent of the state's legislative seats. Indeed, as late as 1963, a mere 22.2 percent of the state's population elected a majority of the state legislature.[11] In Alabama, the largest senatorial district had 634,846 voters, while the smallest had only 15,417, a ratio of 41 to 1. Meanwhile, a 1956 study found that a mere 17 percent of Florida's population elected "a majority of each house" of the state legislature.[12] Even Tennessee, which had constitutional provisions requiring proportional representation (though it had not reapportioned since 1901), displayed in the 1950s a variance in its upper-house districts of 237,905 to 39,727. "The inevitable result of this" state of affairs, as a U.S. district judge for the Middle District of Tennessee noted in 1959, was that "a minority of approximately 37 per cent of the voting population of the state . . . control[ed] 20 of the 33 members of the Senate."[13] One could draw similar examples from almost every southern state.

Southern states were also some of the most adamant in their refusal to reapportion their legislatures. As noted, Tennessee had failed to reapportion for more than sixty years despite the constitutional mandate for proportional representation. Even orders from Tennessee state courts and proposed constitutional amendments demanding reapportionment failed to shift the legislature.[14] Alabama, which also had not reapportioned its legislative seats in more than sixty years, was brought, in the words of legal scholar Robert G. Dixon Jr., "kicking and screaming" into the realm of reapportionment. In *Reynolds v. Sims* (challenging the state's severe malapportionment), the tone of the defendant's brief, Dixon notes, "verged on a plea to raise again the Confederate flag over Montgomery." Rather than defend the current system or answer any of the attacks on the system made by the plaintiffs, the brief

attacked *Baker v. Carr* and asked the Supreme Court to "restore the rule of nonjusticiability, and leave the political thicket alone."[15] Georgia's response to efforts to end its county unit system of apportionment was "invariably hostile." Control of the state by the dominant Democratic faction led by U.S. senator Herman Talmadge depended on "putting together the votes of enough 'two-unit' counties in south Georgia to overcome opposition strength in metropolitan areas, which under a straight count of the popular vote would normally have been victorious."[16] Lose the county unit system, Talmadge warned, and "there won't be enough votes in the whole of the Second Congressional District to match the bloc Negro vote in Atlanta."[17]

Florida's response to demands for reapportionment was more moderate on the surface but no less recalcitrant. For years, senators from the state's northern counties had controlled the Florida legislature through unevenly apportioned senatorial districts, refusing to shift power to the more populous south. The 1885 Florida Constitution (even as amended twice to increase the number of legislators as the state's population grew) imposed a system capping the number of legislative seats allowed a single county; thus, in 1945, Glades County's 2,281 voters elected the same number of representatives as one-third of Dade County's 315,318 voters. In the state senate, the differential between districts was even greater, as the constitution limited each county to no more than a single senator whatever its size. In 1962, when the federal courts demanded that Florida reapportion, the legislature's response was to propose the most minor of constitutional changes, especially in terms of maintaining the imbalance in senatorial seats, and when these changes failed to be ratified, to delay change once again by seeking legal advice from both the governor and the state supreme court on the procedures to be followed in legislative reapportionment. In the end, a federal-court-ordered reapportionment plan was the only way to break the logjam.[18]

Issues of race, in turn, drove this opposition even more than urban/rural competition among whites. Whereas a majority of southern blacks lived in rural areas, the urban black population had the greatest impact on the electoral process, a fact well known to the region's segregationist white leadership. Blacks in the South's cities had the education, the social standing, and the economic resources to take up the often burdensome task of voting in segregated electoral systems that imposed poll taxes or unfairly administered constitutional "understanding" requirements on blacks seeking to vote.[19] These urban black voters, in turn, often played an important role in deciding the outcome of close elections.

In his classic study *Southern Politics in State and Nation* (1949), political scientist V. O. Key Jr. found that while urban southern whites tended to vote less than their rural compatriots, blacks voted "in higher degree in the cities than in rural areas." This differential meant that although the absolute number of black urban voters was small, its relative share of the total urban electorate was often significant, at least in close elections. White politicians, recognizing this fact, often turned to the black community to find the extra votes they needed to win. As Key noted, "A group of voters does not have to be a majority to command deference; a few votes may deflect the course of a political career, a fact of which the politician is keenly aware."[20]

In San Antonio, Texas, for example, political fixer Charles Bellinger maintained "enough [black] votes in his pocket to influence city elections from 1918 until his death in 1935." In Memphis, Tennessee, the black vote was controlled by black Republican leader Robert R. Church, "who regularly delivered the Negro vote in Democratic primaries to Boss Edward H. Crump." Crump, in turn, used his control of the Memphis vote to dominate Tennessee politics.[21] In 1946, black voters in Augusta, Georgia, allied themselves with moderate whites to defeat white supremacist Roy Harris in his bid for a seat in the state House of Representatives. Even though this alliance against the pro-segregationist candidate soon dissolved, the lesson that black voters could shape an election's results was burned forever in Harris's mind: "Some people think the nigger is beneath their dignity. They talk Constitution but they look at the nigger question. They talk state rights but they mean nigger. This never will be a dead issue. Some issues never die."[22] In Florida, well-organized voting blocs in Jacksonville and Miami made black voters serious players in municipal and even statewide elections.[23] And in Atlanta, a large and active black voting population often "made itself felt" at election time through "block voting."[24]

To white southerners, the lesson was clear: talking about the city vote was also talking about the black vote. The two issues were intrinsically linked in the southern white mind, just as reapportionment was linked with civil rights. As Charles Morgan Jr., a white Alabama Democrat, noted in 1964, "There was no doubt in my mind that Black Belt domination in Montgomery [defended by the refusal to reapportion] was the vital political underpinning to a system designed to curb the influence of all the state's Negroes."[25] So even though the actual impact of black voters before the mid-1960s was not very great, politicians perceived that impact to be much more significant. And when it came to the question of reapportionment and the in-

evitable strengthening of urban voters that it would bring, perception was everything.

Litigation Strategies

A second realm in which the South significantly shaped the fight over reapportionment lay in the development of litigation strategies to force change. Social or political reform via the courts is not an easy process. In most instances, the legal precedents do not favor those seeking reform. With the law against them, reformers must argue the facts. They have to focus on exposing the law's logical and practical inconsistencies, making clear how in a real-world context the law as enforced is clearly, notably, and unarguably wrong. Somehow, they have to force judges to ignore existing precedents and to act in response to other, more personal or ideological factors. To put it another way, reformers must make sure that the judges do not blind themselves as jurists to what they know as human beings.[26]

Yet shaming judges into writing new law is a tricky process. Most judges do not want to write new law. The backgrounds and legal training of the vast majority of judges, in fact, argue strongly against such actions. As Justice Oliver Wendell Holmes Jr. once noted, judges "commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties."[27] Overcoming this reluctance takes tact and a ready knowledge of which buttons—personal and social as well as legal and constitutional—to push to get judges to act. Give a judge a loophole, no matter how small, and he or she most likely will use it to avoid the substantive issue.

In the case of reapportionment, reformers found themselves in precisely this situation. Since the 1920s, they had been trying to get the federal courts to take up the reapportionment issue and impose change on recalcitrant state legislatures, and these efforts had repeatedly failed.[28] The federal courts in general and the Supreme Court in particular simply were not interested in these matters. The direct precedents on apportionment cut against the reformers' efforts. As Justice Felix Frankfurter had argued in 1949's *Colegrove v. Green*—the opinion deemed the controlling doctrine in these matters—it was "hostile to a democratic system to involve the judiciary in the politics of the people." There were simply some "demands on judicial power which [were] not meet for judicial determination." And foremost among these out-of-bounds demands were the sorts of political questions associated with

elections. The federal courts, Frankfurter warned, "ought not to enter this political thicket."[29]

Apportionment reformers, however, were not alone in their struggles to get judges to ignore precedent and foster change. Successful efforts in federal courts by African Americans to combat segregation and disenfranchisement provided a litigation model that opponents of malapportionment could quickly and successfully adopt. Thurgood Marshall and the Legal Defense and Education Fund of the National Association for the Advancement of Colored People (NAACP) had shown that the barricade of judicial reluctance could be breached and that the walls of precedent could be surmounted with the proper litigation strategies and tactics. Reapportionment advocates in northern states quickly took note of the NAACP's successes in promoting its social and political agenda in the Supreme Court through litigation and responded accordingly, adopting the basic components of the NAACP's legal strategy. Southern reformers, intimately experienced with these strategies, took up this model of reform as well. In fact, many lawyers who argued southern reapportionment suits in the 1950s and 1960s had personal ties "with civil rights activity." At the very least, as one southern lawyer explained, "they were the kinds of people who were inclined to be involved in other things, which included a far more liberal outlook on race and politics generally, on economics, on free speech, on an open society and an open community."[30]

The key element in the NAACP's strategy was to document with painful clarity the realities of life under segregation. Marshall's briefs were filled with factual data about life for black Americans in a segregated South. Courtroom testimony (where permitted) reinforced these points, as did Marshall's opening and closing arguments.[31] And Marshall and his colleagues would make these arguments time and time again in a multitude of cases, most of them losing cases—for most of the trial cases that Marshall and the NAACP argued were, in fact, losing cases. But NAACP leaders did not see this as a problem. The immediate objective in any race case was not to win at trial (though victory was always welcome) but rather to build up the rationale against segregation, brick by brick, stone by stone. The goal was to educate the trial judge and, even more important, the judges sitting on appellate courts. The impact of this constant argument was cumulative and effective. "It may well be," writes Richard Cortner in his analysis of the NAACP as an "aggressive litigant," that in losing a substantial portion of their cases, the NAACP educated the justices so that the "repose of mind" that Justice

Holmes mentioned was "not so much disturbed by ideas which, because they [were] repeatedly presented to them . . . ceased to be novelties to be hated on sight."[32]

Lawyers in the reapportionment cases adopted from the NAACP's legal strategy against segregation this use of factual arguments supported by as much data as could be collected. As Alfred L. Scanlan noted in a 1963 article on arguing reapportionment cases, "If possible, . . . the reapportionment advocate should emphasize at the outset, and at all stages of his case, the demonstrable futility of seeking legislative relief prior to an authoritative and compelling ruling by a court of competent jurisdiction." The advocate was to follow this advice by "filing a fairly detailed 'Brandeis-type' complaint" with many examples showing "to the fullest extent the past history of legislative inaction." Indeed, Scanlan observed, "to the extent possible, the petitioners in a reapportionment case should attempt to prove . . . that discrimination to which they are subjected in the exercise of voting strength has practical adverse consequences." They should "single out and emphasize compelling statistics illustrating some of the incredible inequalities in representation that may exist." Here, too, the goal was not necessarily to win the case at hand. Arguments of this sort were intended to have a cumulative effect on both the individual justice and the Supreme Court as a whole. At a minimum, Scanlan argued, presenting such statistics would "attract the judges' attention, if not their vote."[33] As with the race cases, the goal from the outset was to get their case before the Supreme Court as the body most likely to force a positive result.[34]

Judicial Precedents and Experience

Except for the nine justices on the Supreme Court, every decision a judge makes is subject to review and possible reversal—and even decisions of the nine justices can be reversed by a different panel of justices in the future (as happened when the Supreme Court in *Brown v. Board of Education* negated the decision made fifty-eight years earlier in *Plessy v. Ferguson*) or by constitutional amendment (though this possibility is increasingly rare). This scrutiny from above leads most judges to be extremely conservative in their application of the law. Judges are comfortable with precedents, especially precedents handed down by the Supreme Court. Precedents provide judges with direction; at the least, they provide a foundation on which a judge can build legal arguments and factual defenses for his or her actions and rul-

ings. They also provide cover for a judge uncomfortable with the result that he or she believes must be reached. Asking a judge to move beyond an established precedent is a risky proposition. Even if the judge is willing to move in the advocate's direction, there is still that problem of defying conflicting precedents and risking the potential of later reversal.

One way around this dilemma is for lawyers in their briefs to present plausible counterprecedents that can be stretched to justify the judge's actions. The fit need not be perfect, just credible. The discovery of such counterprecedents makes the likelihood of a judge forging new paths in the law much greater.

The application of such counterprecedents in reform litigation is a third way that the South and its issues with race influenced the reapportionment revolution. The Supreme Court's rulings in race-based cases—in particular *Smith v. Allwright*, *Brown v. Board of Education*, and *Gomillion v. Lightfoot*—gave jurisprudential cover to the justices as they adopted and then enforced the highly controversial one person, one vote standard for apportionment. Absent these landmark civil rights cases decided by the nation's highest court, the precedents in reapportionment matters were clear and absolute—the federal courts had no role in adjudicating such political matters.[35]

The civil rights cases of the 1940s and 1950s, however, offered a more expansive reading of the scope and reach of the Fourteenth Amendment and the federal courts' role in enforcing these constitutional rights. *Smith* made clear that enforcement of the Fourteenth Amendment rested not just on the wording of the law but on its application and impact. Where the actual, practical effects of a law—such as that banning voting by blacks in Texas's Democratic primaries—deprived citizens of their constitutional rights to a meaningful vote (and in Texas, the Democratic primary was the only vote that counted), then that law violated the Fourteenth Amendment.[36] *Brown* and the education cases that preceded it set the more general standard that discrimination under the law depended less on the law's wording than on its impact.[37] Most applicable was the racial gerrymandering case of *Gomillion*, decided just before the Supreme Court heard the oral arguments in *Baker v. Carr*. In 1957, the state legislature of Alabama redrew the district lines for the city of Tuskegee to exclude almost all of that city's registered black voters and did so with the exclusive objective of depriving blacks of the political power that their numbers should have brought them. Even though this example was the opposite of refusing to redraw a district to correspond to shifting population realities, its discriminatory effect was the same. And although

the Court ultimately settled this case in favor of the plaintiffs on Fifteenth Amendment grounds (rather than the Fourteenth Amendment grounds on which reapportionment cases are generally argued), the decision's overall message was clear: allowing voting district lines to exclude select segments of the population from a meaningful vote was unconstitutional.[38]

By adopting these cases as their precedents, the justices in the reapportionment cases could and did circumvent the restrictions imposed by Justice Frankfurter's (and his predecessors') narrow reading of the political questions doctrine. The fit may not have been perfect. *Gomillion* was decided on Fifteenth Amendment grounds, and the Fourteenth Amendment basis for *Smith* and *Brown* rested explicitly on the racial component of the laws challenged. Still, these cases were close enough to justify the Court's new reading and enforcement of reapportionment rights. As solicitor general Archibald Cox argued before the Court in *Baker v. Carr*, "It is unsound to distinguish *Gomillion* from the present case on the ground that it arose under the Fifteenth Amendment. The Fourteenth Amendment protects the right to vote . . . and arbitrary geographical distinctions are scarcely less invidious than discriminations based upon race."[39] In both sets of cases, government policies and statutory provisions created a pattern of discrimination at odds with equal protection as commonly understood. Individuals and groups were not being granted their fair say in the governing process. The justices were merely responding in kind to similar problems. As historian Michal R. Belknap has noted, "The Warren Court saw its reapportionment rulings as based on the same constitutional guarantee as *Brown v. Board of Education* and perceived a close relationship between the two."[40]

In this way, the race cases can be seen as having an educative effect on many of the justices in the reapportionment cases. Both *Smith* and *Gomillion* were about voting and power. Each had taught the justices how legislative rules and procedures could have a discriminatory effect great enough and intentional enough to violate the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment's explicit ban on racial discrimination in voting. In both cases, segregationist officials used their authority to exclude African American voters from the polls. More to the point, this effort was done with clear and explicit discriminatory intent. *Brown* made this same point about the wider issue of the South's entire system of segregation. It was not a great leap of faith to connect exclusions based on race with exclusions based on residential patterns. In both cases, government policies and actions were excluding segments of the population from the governing

process and hence from real power over the world in which they lived.[41] As Chief Justice Warren noted in *Reynolds v. Sims*, "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race."[42] Absent the race cases, some justices might not have been so quick to understand the reformers' claims of discrimination or to understand on a gut level what this discrimination meant in the real-world context of power and control.

The race cases of the 1940s and 1950s also had another, more direct (if somewhat speculative) effect on the justices' actions in deciding the reapportionment cases. One of the most notable differences between the southern race cases of the 1950s and the reapportionment cases of the 1960s was in the remedies that the Supreme Court imposed. In *Brown*, the Court took a slow, careful, even timid approach to enforcement. Rather than simply ordering the desegregation of southern schools, as the plaintiffs had requested, the justices remanded the cases back to district judges with orders to desegregate "with all deliberate speed" (a term from equity jurisprudence provided by Justice Frankfurter and intended both to convey the need to act and to emphasize the need to ponder carefully how best to act).

The Court's caution was intentional. Following its initial 1954 ruling against segregated schools (commonly referred to as *Brown I*), the Court held a new hearing in 1955 (referred to as *Brown II*) on how best to enforce this decision. At that hearing, the defendants filed many requests for delay with the Court. Robert Figg, representing Clarendon County, South Carolina, argued that community opinion was against desegregation; too abrupt an order from the Court would induce whites to flee the schools. Archibald Robertson of Virginia agreed, proposing that community attitudes had to change before desegregation could have a chance of success. After all, it had taken the Court sixty years to change its opinion; surely, he reasoned, the South deserved a little time to change its collective mind. The attorney general of Florida echoed this line. "Give the people a chance through the democratic process to change the attitudes . . . of the community. . . . If it does not work, you can . . . come back to a deadline timetable."[43]

The Court's final ruling in *Brown II* heeded these warnings. In conference, Chief Justice Warren had noted how it would be "rather cruel" to burden the district courts with implementation while letting them flounder without any guidelines from above. Yet the *Brown II* decision did just that. The perceived need for unanimity as well as the realization that effective

reform could come only at the hands of the white southerners themselves mandated this action. The justices were giving the South—both generally and in the persons of the district judges, white southerners all—a chance to reform and thus to control the pace and final shape of desegregation.[44] The question was, would they accept the offer?

The white South's answer was an unequivocal no. Few whites in the South accepted the Supreme Court's offer in 1955 of voluntary desegregation; most opposed the offer outright. In Virginia, state leaders called for a policy of "massive resistance" to desegregation. At the governor's urging, the state legislature enacted a law requiring the closure of any public school threatened with integration as well as permanently cutting off state funds to all other schools in that district.[45] In Louisiana, the legislature passed laws denying promotion or graduation to any student from an integrated school. The Mississippi legislature declared it illegal to attend an integrated school. Georgia, Texas, South Carolina, North Carolina, and Alabama enacted similar laws closing schools if integration were ordered by the courts. So, too, did Arkansas, where a plan to close Little Rock's public schools and turn over control of these schools, with public funding, to a private company, was adopted in direct response to the Supreme Court's decision upholding an order integrating Central High School.[46]

The race cases, in other words, taught the justices clear and troubling lessons about the enforcement difficulties associated with sweeping constitutional rulings, and these lessons proved applicable to reapportionment matters. A report by six law clerks commissioned by the chief justice in 1955 for *Brown II* had pointed out the dangers of ambiguity. A lack of clear guidelines could only increase confusion and encourage delay, the report read. What was needed was a specific Supreme Court directive setting clear standards (and deadlines) of enforcement. This command would give the lower courts a clear understanding of the end results desired. It would also allow them "to point to a superior authority in undertaking what will often be unpopular action."[47] As Marshall had noted in argument before the Court in *Brown II*, absent a clear mandate to the district judges, "the Negro in this country . . . would be as bad, if not worse, off than under the 'separate but equal' doctrine."[48] Yet for reasons of maintaining unanimity, a hope of compromise within moderate southern elements, and most of all, a fear of judicial overreach (should the South ignore the Court's rulings), the justices felt constrained to stress maximum flexibility rather than express guidelines in

enforcing *Brown*.[49] The result, as Marshall had warned, was that a decade later, little if any actual desegregation had taken place.

In this context, the Court's adoption of the one person, one vote standard can be seen to have its roots in the South's racial problems and the justices' struggles with lawsuits dealing with those problems. If going slowly and carefully did not work in *Brown*, the justices seem to have asked themselves, would a hard, sharp, and unconditional remedy imposed directly by the Court do a better job in reapportionment matters? Whatever its source, their answer seemed to be yes; unlike the case in *Brown*, in the reapportionment cases the justices took a hard line on remedies.[50] Starting with *Gray v. Sanders* and followed quickly by *Wesberry v. Sanders* and *Reynolds v. Sims* the Court not only adopted a clear, easy-to-understand standard of one person, one vote—what Justice Potter Stewart described sarcastically in dissent as "the uncritical, simplistic, and heavy-handed application of eighth-grade arithmetic"—it rigidly applied this standard to the cases that followed.[51] Granted, the Court at first seemed to want to leave it to the states (and the lower federal courts) to devise answers about how to apply a one person, one vote standard: it noted in *Reynolds* that states would need to show "an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. . . . Mathematical exactness or precision is hardly a workable constitutional requirement."[52]

However, later cases soon made clear the Court's commitment to just such "mathematical exactness" in legislative districting. In *Swann v. Adams* (1967), the justices applied the doctrine to overturn a Florida reapportionment plan that allowed variations of 30 percent among state senate seats and 40 percent among House districts even though a lower federal court had accepted such variations as valid.[53] In *Kirkpatrick v. Preisler* (1969), the justices rejected a Missouri congressional redistricting plan that allowed for 5.97 percent population deviation between districts. Missouri had argued that the actual numbers of voters affected were so small that the plan should "not require independent justification." The Court disagreed. "We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis*," wrote Justice Brennan for the Court. Although "the extent to which equality may practicably be achieved may differ from State to State and from district to district," the Constitution required a State to "make a good-faith effort to achieve precise mathematical equality" and where such equality was not achievable, to "justify each

variance, no matter how small." Equal representation for equal numbers of people, explained Brennan, was "a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detract[ed] from these purposes."[54] In later years, the Court overturned a New York redistricting plan with a 13.1 percent deviation and a Texas plan with only a 4 percent deviation.[55] One person, one vote meant precisely that—one person, one vote. As the Court would explain in *Karcher v. Daggett* (1983), even a variation of less than 1 percent between districts was unacceptable under this standard without adequate proof of a good-faith effort by the state to achieve mathematical equality.[56]

Reaction and Acceptance

The initial responses to the reapportionment rulings were loud, angry, and highly negative.[57] *Baker* quickly became a "lightning rod for criticism of the Court."[58] Opponents depicted the ruling as a major assault on the American constitutional system.[59] The shift to a one person, one vote standard in *Gray*, *Wesberry*, and especially *Reynolds* only magnified this opposition. In 1964, the House of Representatives, led by Virginia Democrat William Tuck, approved a bill by a floor vote of 218–175 that eliminated the federal courts' jurisdiction over all pending and future challenges to the apportionment of state legislatures. One year later, a majority of senators supported a proposed constitutional amendment that would allow states with bicameral legislatures to apportion one house on a basis other than population equality, although the measure failed to gain the necessary two-thirds majority to go to the states.[60] Then, after the sound and fury, there was silence. The opposition died away as the reapportionment issue "went from debatable in 1964 to unquestionable in 1968."[61]

The sources of this shift were in part practical—and racial—in nature. Many of the most adamant opponents to reapportionment were white southern political leaders. Although politicians from the Midwest and West had their objections to one person, one vote, the white South's political leaders were united in their opposition to such reforms.[62] In the eyes of many northerners, including politicians who otherwise would have worked against the Court's decisions, this unified white southern opposition tainted the fight against reapportionment. The link between race and apportionment in the South was clear to many observers, and the white southerners' unclean hands in such matters led some politicians to question their oppo-

sition to reapportionment.[63] Legal scholar William Ross suggests that "the prominence of segregationists among proponents of Court-curbing helped to stigmatize efforts to curb the Court even among many advocates of states' rights."[64] At the least, the white South's unclean hands likely made supporting the one person, one vote standard and the efforts to enforce it more palatable for many moderates and even some conservatives nationwide.

The shift away from opposition to reapportionment occurred in the South as well as the North. By the end of the 1960s, the context within which such matters were debated in the South had changed. Adoption of the Voting Rights Act of 1965—and the willingness of all three of the federal branches of government to enforce its provisions—raised a threatening specter for southern whites: an effectively empowered southern black electorate.[65] Should the true intent of the Voting Rights Act be achieved, it threatened a much more radical realignment of political power in the South than reapportionment would bring. Suddenly, the individualistic one person, one vote standard seemed almost tame by comparison.

Moreover, one person, one vote provided a useful cover for those opposing black electoral power by such vote dilution techniques as at-large elections or majority vote requirements. One person, one vote concerned itself only with individual numerical equivalencies; as long as voting districts were equal in numbers, they were constitutional. As structured, at-large voting actually came close to the abstract ideal behind one person, one vote—every voter in a particular jurisdiction voted for or against every candidate running. How could one's vote be made any more equal to another person's vote than this? Considered one on one, black votes had an equal chance with white votes to influence the election's outcome. Even race-conscious gerrymandering specifically designed to submerge concentrated black communities into white majorities did not explicitly conflict with *Reynolds* if the districts were of equal size.[66]

Viewed in terms of racial bias, however, at-large elections and gerrymandered districts were the exact antithesis of the intent behind "one person, one vote." By burying their African American voting population in a larger white majority population, southern leaders thus could minimize the practical effects of voting rights reforms.[67] Ironically, only by embracing the new reapportionment standard could white southern political leaders justify their efforts to undermine the clear intent of the Voting Rights Act of 1965.

Reapportionment also had other uses for maintaining the essence of segregation in an integrated South. Although it was historically true that the

majority of African American voters resided in the cities, the majority of southern blacks lived in the rural districts. A mix of formal, informal, and even outright violent disenfranchising techniques had kept rural blacks from even registering to vote, let alone from voting. In fact, throughout the middle years of the twentieth century, researchers found that the greater the percentage of African Americans residing in a county, the lower the actual rate of black voter registration.[68] The Voting Rights Act of 1965 promised to change all this. Empowered by the law and protected by the federal government, all classes of blacks—rural and urban—began registering to vote; they even began to use their right to vote in elections. Allowing reapportionment to shift the balance in legislative seats away from the rural counties and toward the urban and especially the mostly white suburban districts had the net effect of lowering the potential electoral clout of African American voters. Add the tendency of white legislators to gerrymander districts to break up large groups of black voters wherever they existed, and the segregating effects of reapportionment came to serve the interests of those opposing racial integration.

* * *

Normally, when we hear the terms *race* and *reapportionment* linked together, the logical assumption is that the topic under discussion is the federal government's efforts to combat race-based vote dilution via the mechanism of what came to be called "majority-minority districting" in the 1970s, 1980s, and beyond. This is a logical deduction. Race played a key role in shaping the redistricting process in those states covered by the Voting Rights Act of 1965. The influence of race (and hence of the South), however, entered the picture long before the rise of majority-minority districting. And it continued to have an influence long after these cases were decided. As Robert G. Dixon Jr. has noted, "It is a fair question whether without the South, which has forced the 'making' of so much constitutional law for the nation in the last two decades, the reapportionment rulings would have come when they did or have been handled in such sweeping fashion."[69]

The answer, this essay has argued, is no. Although the need for legislative reapportionment would have existed had there been no South or had the South's peculiar racial tensions not existed, the Supreme Court's response to this need would likely have been far more hesitant, troubled, uncertain, and perhaps even ineffective. Maybe the justices would not even have brushed

past the "political questions" doctrine at all. So even though race and the South's problems with race were not the only forces influencing the reapportionment revolution, that revolution definitely had southern roots that shaped its form and effects.

NOTES

1. Those states requiring apportionment of their upper houses based on population included Colorado, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, North Carolina, Tennessee, Virginia, Washington, West Virginia, and Wisconsin. For the lower houses, those states basing apportionment on population were Colorado, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Tennessee, Virginia, Washington, and Wisconsin. Those states allowing "minor" variations based on factors other than population in setting legislative apportionment for the upper house included Alaska, Missouri, New Hampshire, New York, Pennsylvania, South Dakota, and Alaska. For the lower houses, they were New Hampshire, Oregon, and South Dakota. See Robert G. Dixon Jr., *Democratic Representation: Reapportionment in Law and Politics* (New York: Oxford University Press, 1968), 86–87.

2. Robert McKay, *Reapportionment: The Law and Politics of Equal Representation*, (New York: Twentieth Century Fund, 1965), 44, 86–87; Stephen Ansolabehere and James M. Snyder Jr., *The End of Inequality: One Person, One Vote and the Transformation of American Politics* (New York: Norton, 2008), 26–27; Malcolm E. Jewell, "Constitutional Provisions for State Legislative Apportionment," *Western Political Quarterly* 8, no. 2 (1955): 271–73; Elizabeth Durfee, "Apportionment of Representation in the Legislature: A Study of State Constitutions," *Michigan Law Review* 43, no. 6 (1945): 1102.

3. *Fergus v. Marks*, 321 Ill. 510 (1926); *Fergus v. Kinney*, 333 Ill. 437 (1929); *Board of Supervisors v. Blacker*, 94 Mich. 638 (1892); *Burns v. Flynn*, 155 Misc. 742, 28 N.Y. Supp. 494 (Sup. Ct. 1935); *Romang v. Cordell*, 200 Okla. 369 (1952); *Latting v. Cordell*, 197 Okla. 369 (1946).

4. E.g., *Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn., 1959), 826–28, which noted the clear violation of the Fourteenth Amendment in Tennessee's refusal to reapportion its legislative districts but nonetheless dismissed the case for lack of jurisdiction and the failure of the plaintiffs to state a cause of action. "There is no doubt that the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment." See also *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Smiley v. Holm*, 285 U.S. 355 (1932); *Wood v. Broom*, 287 U.S. 1 (1932); *Mahan v. Hume*, 287 U.S. 575 (1932); *Cook v. Fortson*, 329 U.S. 675 (1946); *Turman v. Duckworth,* 329 U.S. 675 (1946)*; Colegrove v. Green*, 328 U.S. 549 (1949); *Tedesco v. Board of Supervisors*, 339 U.S. 940 (1950); *Remmey v. Smith*, 342 U.S. 916 (1952); *Cox v. Peters*, 342 U.S. 936 (1952); *Anderson v. Jordan*, 343 U.S. 912 (1952); *Kidd v. McCanless*, 352 U.S. 920 (1956); *Radford v. Gary*, 352 U.S. 991 (1957); *Matthews v. Handley*, 361 U.S. 127 (1959).

5. *Baker v. Carr*, 369 U.S. 209, 226, 236.

6. *Reynolds v. Sims*, 377 U.S. 533, 559–60, 563–65, 567, 576–77, 586–87.

7. *Swann v. Adams*, 385 U.S. 447 (1967); *Avery v. Midland County*, 390 U.S. 474 (1968); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wells v. Rockefeller*, 394 U.S. 542 (1969); *White v. Weiser*, 412 U.S. 783 (1973); *Karcher v. Daggett*, 462 U.S. 725 (1983).

8. See generally, Ansolabehere and Snyder, *End of Inequality*.

9. *Smith v. Allwright*, 321 U.S. 649 (1944); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

10. Lucas A. Powe Jr., *The Warren Court and American Politics* (Cambridge: Harvard University Press, 2000), 493, notes how "the South had some of the most starkly malapportioned legislatures." See also Dixon, *Democratic Representation*, 217, n. 54.

11. Durfee, "Apportionment of Representation," 1102; McKay, *Reapportionment*, 46–47.

12. Anthony Lewis, "Legislative Apportionment and the Federal Courts," *Harvard Law Review* 71, no. 6 (1958): 1061; Manning J. Dauer and Robert G. Kelsay, "Unrepresentative States," *National Municipal Review* 44, no. 11 (1955): 575.

13. *Baker v. Carr*, 179 F. Supp. 825–26.

14. Richard C. Cortner, *The Apportionment Cases* (New York: Norton, 1970), 31–35.

15. Dixon, *Democratic Representation*, 211; Cortner, *Apportionment Cases*, 161, 163.

16. Peyton McCrary and Steven F. Lawson, "Race and Reapportionment, 1962: The Case of the Georgia Senate Redistricting," *Journal of Policy History* 12, no. 3 (2000): 295.

17. Quoted in Laughlin McDonald, *A Voting Rights Odyssey: Black Enfranchisement in Georgia* (New York: Cambridge University Press, 2003), 82. See also McCrary and Lawson, "Race and Reapportionment," 295.

18. *Sobel v. Adams*, 208 F. Supp. 316 (1962); *Sobel v. Adams*, 214 F. Supp. 811 (1963); *Swann v. Adams*, 378 U.S. 553 (1964); *In re Advisory Opinion to the Governor*, 150 So. 2nd 721 (1963); *Swann v. Adams*, 378 U.S. 553 (1967); *Swann v. Adams*, 263 F. Supp. 225 (1967). See also Kevin N. Klein, "Guarding the Baggage: Florida's Pork Chop Gang and Its Defense of the Old South" (PhD diss., Florida State University, 1995), 175–77, 187.

19. V. O. Key Jr., *Southern Politics in State and Nation* (New York: Knopf, 1949), 517–22.

20. Ibid., 527–28.

21. George Tindall, *The Emergence of the New South, 1913–1945* (Baton Rouge: Louisiana State University Press, 1967), 167; Key, *Southern Politics*, 62–64; M. Jerome Diamond, "The Impact of the Negro Vote in Contemporary Tennessee Politics," *Tennessee Law Review* 34, no. 33 (1967): 435.

22. Steven F. Lawson, *Black Ballots: Voting Rights in the South, 1944–1969* (Lanham, Md.: Lexington Books), 135.

23. H. D. Price, *The Negro and Southern Politics: A Chapter of Florida History* (New York: New York University Press, 1957), 55, 59, 66.

24. Paul Lewinson, *Race, Class, and Party: A History of Negro Suffrage and White Politics in the South*, 3rd ed. (New York: Grosset and Dunlap, 1965), 104; McDonald, *Voting Rights Odyssey*, 82.

25. Charles Morgan Jr., *A Time to Speak* (New York: Harper and Row, 1964), 102–3, quoted in Cortner, *Apportionment Cases*, 164.

26. See generally, Alan Robert Burch, "Charles Hamilton Houston, the Texas White Primary, and Centralization of the NAACP's Litigation Strategy," *Thurgood Marshall Law Review* 21, no. 1 (1995): 95–154.

27. Quoted in Cortner, *Apportionment Cases*, 265.

28. Ibid., 3–27.

29. *Colegrove v. Green*, 553–54, 556.

30. Unnamed lawyer quoted in Jonathan David Casper, "Lawyers in Defense of Liberty: Lawyers before the Supreme Court in Civil Liberties and Civil Rights Cases, 1957–1966" (PhD diss., Yale University, 1968), 125.

31. "The NAACP was heavily reliant upon non-legal materials to overcome [the] precedents" against the group (Richard C. Cortner, "Strategies and Tactics of Litigants in Constitutional Cases," *Journal of Public Law* 17, no. 2 [1968]: 306).

32. Ibid., 306–7.

33. Alfred L. Scanlan, "Problems of Pleading Proof and Persuasion in a Reapportionment Case," *Notre Dame Law Review* 38, no. 4 (1962–63): 421–27.

34. Cortner, "Strategies and Tactics," 294.

35. *Colegrove v. Green*, 556.

36. On *Smith* and the Texas all-white primary, see Charles L. Zelden, *Battle for the Black Ballot: Smith v. Allwright and the Defeat of the Texas All-White Primary* (Lawrence: University Press of Kansas, 2004).

37. See generally Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Vintage, 1977).

38. Bernard Taper, *Gomillion versus Lightfoot: The Tuskegee Gerrymander Case* (New York: McGraw-Hill, 1962).

39. Quoted in Robert M. Crea, "Note: Racial Discrimination and *Baker v. Carr*," *Journal of Legislation* 30, no. 2 (2004): 301.

40. Michal R. Belknap, "The Real Significance of *Brown v. Board of Education*: The Genesis of the Warren Court's Quest for Equality," *Wayne Law Review* 50, no. 3 (2004): 887–88.

41. On this point, see Crea, "Note." See also J. Skelly Wright, "Thurgood Marshall: A Tribute," *Maryland Law Review* 40, no. 3 (1981): 398–400, on the educative effect of the race cases on federal judges.

42. *Reynolds v. Sims*, 566.

43. Quoted in Kluger, *Simple Justice*, 730–34.

44. Ibid., 739–40.

45. Robert A. Pratt, *The Color of Their Skin: Education and Race in Richmond, Virginia, 1954–1989* (Charlottesville: University Press of Virginia, 1992), 6–9; J. W. Peltason, *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation* (Urbana: University of Illinois Press, 1971), 208–18.

46. Reed Sarratt, *The Ordeal of Segregation* (New York: Harpers, 1966), 30, 39; Peltason, *Fifty-Eight Lonely Men*, 193–96; *Cooper v. Aaron*, 358 U.S. 1 (1958).

47. Kluger, *Simple Justice*, 737, 739–40; Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—a Judicial Biography* (New York: New York University Press, 1983), 116, 118.

48. Quoted in Kluger, *Simple Justice*, 730. Marshall went on to explain to the justices, "What is needed is a firm hand. . . . A district court properly instructed by this Court will supply the firm hand. . . . But the Supreme Court must arm the district judges and appellate judges with authority. If no time is set, [the defendants are] going to argue in any event the same way they have argued here, which is nothing. If no time limit is included the district judges will be placed in the legislative field—their duties are merely to tell the state what it can't do" (quoted in Peltason, *Fifty-Eight Lonely Men*, 15).

49. On the justices' concerns regarding the likelihood of enforcement difficulties and the ramifications of these difficulties should they arise as well as how these concerns

shaped the final opinion in *Brown II*, see Powe, *Warren Court*, 50–52; Schwartz, *Super Chief*, 118–20.

50. Dixon, *Democratic Representation*, 210, quotes Charles M. Morgan Jr. of Birmingham Alabama, one of the plaintiffs' lawyers in *Reynolds*, as observing that, at least as regarded southern district judges' attitudes toward reapportionment remedies, "more rapid remedial results seem to have been reached in the Southern Federal Courts than in those of other sections. My personal belief is that the United States District Judges in the south, having been faced with cantankerous legislatures and general vilification since *Brown v. Board of Education* seem less fearful of seemingly drastic remedies than do others. Many of the judges of the Fifth Judicial Circuit have had to fashion decrees with the knowledge that at least the United States Army would be necessary to carry them out." It is possible that by the early 1960s the justices of the U.S. Supreme Court were equally prepared for the possibility of a negative response by politicians and state and local governments on the issue of remedies. As noted, however, at this time this is just speculation as to the justices' motivation for their actions.

51. *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 at 747–48, 750 (1964).

52. *Reynolds v. Sims*, 577.

53. *Swann v. Adams*, 385 U.S. 447 (1967).

54. *Kirkpatrick v. Preisler*, 530–31.

55. *Wells v. Rockefeller*; *White v. Weiser*.

56. *Karcher v. Daggett*.

57. See generally Chris Hickman, "The Warren Court Enters the Thicket: The Apportionment Revolution and Its Enemies" (unpublished manuscript, 2010).

58. William G. Ross, "Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail," *Buffalo Law Review* 50, no. 2 (2002): 532.

59. "Capital Is Split on Apportioning," *New York Times*, March 28, 1962.

60. E. W. Kenworthy, "House Votes Ban on Court Power to Reapportion," *New York Times*, August 20, 1964; E. W. Kenworthy, "Dirksen Proposal on Redistricting Beaten in Senate," *New York Times*, August 5, 1965. See also David J. Garrow, "Bad Behavior Makes Big Law: Southern Malfeasance and the Expansion of Federal Judicial Power, 1954–1968," *St. John's Law Review* 82, no. 1 (2008): 20.

61. Powe, *Warren Court*, 585.

62. In the vote on Tuck's bill, every Democratic vote in favor of limiting the Supreme Court's jurisdiction came from a southern representative (Hickman, "Warren Court Enters the Thicket," 48).

63. Hickman, "Warren Court Enters the Thicket," 49, notes, "Tuck and the over two hundred representatives who supported his measure had vocal allies outside the halls of Congress. Columnist and editorial champion of massive resistance James Kilpatrick joined the Virginia Commission on Constitutional Government. . . . Steadfastly in opposition to the Court's civil rights rulings, the group expressed alarm over the apportionment jurisprudence. With participants like these, however, it had become far too easy then to dismiss the opponents of the apportionment rulings as nothing but the enemies of *Brown*."

64. William G. Ross, "The Resilience of *Marbury v. Madison*: Why Judicial Review Has Survived So Many Attacks," *Wake Forest Law Review* 38, no. 2 (2003): 751 n. 130.

65. McCrary and Lawson, "Race and Reapportionment," 296.

66. See Binny Miller, "Who Shall Rule and Govern—Local Legislative Delegations, Racial Politics, and the Voting Rights Act," *Yale Law Journal* 102, no. 1 (1992): 156–58.

67. For an example of how this process worked in a single state, see Frank R. Parker, "County Redistricting in Mississippi: Case Studies in Racial Gerrymandering," *Mississippi Law Journal* 44, no. 3 (1973): 391–424.

68. Lawson, *Black Ballots*, 130; Diamond, "Impact of the Negro Vote," 440.

69. Dixon, *Democratic Representation*, 263.

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Defending the Right to Discriminate

The Libertarian Challenge to the Civil Rights Movement

Christopher W. Schmidt

The Southern view, strongly held, is that in a free society, great care should be taken to secure the individual's freedom. The owner of a neighborhood drug store, or dress shop, or soda fountain, as we see it, has a right *to choose his customers as he sees fit. Call this a property right, or a right of privacy, or a right of free association[.] It too is a civil right.*

—Robert T. Simpson, Associate Justice, Supreme Court of Alabama, 1964

ON JULY 2, 1964, after more than a year of national debate, Congress passed and President Lyndon B. Johnson signed into law the Civil Rights Act of 1964. The most controversial part of the law was the public accommodations provision (Title II), which prohibited racial discrimination in most of the nation's restaurants and hotels. One business affected by this new federal antidiscrimination requirement was the Pickrick, an Atlanta restaurant locally famous for its fried chicken and owned by one Lester Maddox. The Pickrick only served whites, and Maddox had no intention of changing this policy. Within days of the passage of the Civil Rights Act, three black students arrived at the Pickrick intending to test their new legal rights. Maddox planted himself in front of his restaurant, pistol in hand, flanked by a group of local whites, each armed with ax handles that Maddox had supplied.[1]

In explaining his defiant stance, Maddox referenced the standard arguments of defenders of Jim Crow—arguments well rehearsed from a decade of white southern resistance to school segregation. A white supremacist,

Maddox found confirmation for his views in both biology and scripture, and he made little effort to hide his belief in African American inferiority. Predictably, he also cited the principle of states' rights and the constitutional limits of federal authority. Raw racism and claims of state autonomy were centerpieces of the case against the civil rights movement, and Maddox deployed them passionately and frequently.[2]

But another line of argument that Maddox pursued was more individualistic and libertarian. As he explained to a reporter, he was "shocked to hear . . . that I must as an American forgo my rights under the Constitution and become subservient to those who demand that I must surrender my rights as an American and my property. . . . It's involuntary servitude; it's slavery of the first order, it shows complete, utter disregard for the United States Constitution."[3] This was a question of constitutional liberties—those of white business owners—and, as Maddox assured a rally of his supporters the day following his confrontation with the black students, "Freedom will prevail."[4] When he found himself the target of a lawsuit for his refusal to follow federal law, he took his case to the people, running an advertisement in the local newspaper in which he explained that if he was sent to jail for his actions, "it won't be Lester Maddox going to jail, nor just the Pickrick closing. . . . It will be freedom and liberty being placed behind bars for LIFE."[5] Maddox's lawyer argued his client's case in federal district court. "The Constitution was designed to preserve the freedom of a man to discriminate," he explained. "What greater freedom is there than to select your own associates, to serve whom you want to serve?"[6] When eventually forced to comply with federal civil rights law, Maddox sold his restaurant. He then had a monument erected in front of the Pickrick commemorating "the death of private property rights in America."[7]

Maddox was an exceptional character. Outspoken, uncompromising, Maddox the showman was willing, even eager, to use violence to protect what he viewed as his fundamental rights. (He also won the Georgia governorship in 1966, campaigning on a platform of segregationist defiance.) Yet the claims of a constitutionally based "right to discriminate" that Maddox angrily pronounced were actually not as far outside the mainstream as one might assume. Alongside arguments based on principles of states' rights and deference to majoritarian white supremacist traditions, a libertarian critique of antidiscrimination policy was a basic element of the white South's legal case against civil rights. A claim of a right to discriminate had little to no chance of being accepted in a court of law. When given the opportunity

to review Maddox's claim that the Civil Rights Act violated his individual rights, a panel of three federal judges did what practically every other judge of the era did with these kinds of arguments—dismissed them as frivolous.[8] Nonetheless, the claim of a right to discriminate—described variously as a question of freedom of choice, property rights, privacy rights, associational rights, even freedom from involuntary servitude—provided a prominent and powerful language for opposing or limiting civil rights reform. It was heard in all the major legal debates of the civil rights era.

The Right to Discriminate and the History of the Civil Rights Movement

In the historical literature on the civil rights movement, claims that individuals have a legal right to discriminate based on race have received only passing and usually dismissive reference. The reasons are not hard to discern. As the story of Lester Maddox shows so well, the most outspoken proponents of this right to discriminate tended to fall into one of two overlapping camps: white supremacists and libertarian ideologues. In any event, history largely passed them by. Congress passed the 1964 Civil Rights Act, which included protections against discrimination not only in public accommodations but in private employment as well, and then four years later passed an open-housing law that went ever further in limiting property rights in the name of banishing racial discrimination from American life. Furthermore, the right to discriminate was a conspicuous failure in the courts, the one place where the legitimacy of rights claims are most commonly measured. Thus we have a loser of a legal claim being pressed by a rather unsavory or simply marginal cast of characters who seem to be losing all the major battles. One of the lessons of the civil rights movement would seem to be that there is in fact no right to discriminate. It was an illegitimate claim made by Jim Crow's desperate last defenders. Why spend time trying to understand something that simply does not exist?

But the right to discriminate was central to the legal landscape of the civil rights era. Although rarely recognized as a judicially cognizable right, it was a powerful presence in practically all legislative and public debates over antidiscrimination laws. Furthermore, it was a legal claim that was in fact grounded in a fundamental principle of liberal society. The belief that there should be limits to the reach of antidiscrimination law—limits based not only in the practicality of enforcement but also in a principle of individ-

ual liberty—has always existed when people have debated the scope of civil rights policy. That a right to discriminate exists in certain areas of private life was and still is generally accepted. The critical question was where to draw the line between the sphere of choice that should be protected from government interference and choices that should be held to public account. Contestation over the placement of this line was one of the central legal issues of the civil rights era.

A focus on the right to discriminate expands our understanding of the legal history of the civil rights movement in several ways. First, it presents an ideal case study of extrajudicial constitutional development, a topic of growing interest to legal scholars.[9] To appreciate the full significance of this particular constitutional claim requires expanding our conception of legal rights beyond the realm of those claims recognized by judges. Claims of a constitutionally grounded right to discriminate were all but laughed out of court, yet outside the courtroom, these claims resonated. The right to discriminate proved an influential factor in legislative and public debates regarding the reach of antidiscrimination policy. Predictably, it was frequently deployed by civil right opponents. But it also received consideration even from supporters of civil rights reform. One cannot fully understand the civil rights movement without coming to terms with this particular right.

Second, a study of the right to discriminate shows how the civil rights movement nurtured constitutional rights claims not only among proponents of the black freedom struggle but also among those opposed to the cause. Historians and legal scholars have given considerable attention to the movement's transformative impact on constitutional development, yet most attention has focused on achievements of the movement's protagonists. Not enough focus has been given to the constitutional arguments put forth by those who lost the critical battles of the day. A fuller exploration of the reasons these legal arguments resonated is needed. "Segregationists, like all people, did not think of themselves in terms of what they opposed but rather in terms of what they supported," writes historian Kevin M. Kruse. "Anyone seeking to understand segregationists—not to excuse or absolve them, but to understand them—must first understand how they understood themselves."[10] Opponents of antidiscrimination policy understood themselves to be fighting for the cause of freedom. This was a particular kind of freedom, one quite different from the egalitarian freedom vision that moved civil rights activists.[11] But the vision of freedom motivating defenders of the right to discriminate also had deep roots in America's constitutional tradition.

The resilience of what many would assume a meritless legal claim points to two additional reasons this issue warrants serious consideration. For a commitment generally associated with a particularly southern view of civil rights, the right to discriminate fared well outside the South. Indeed, its most sweeping victory came in California in a 1964 popular referendum on housing policy. A history of the battle over this right thus further undermines accounts of the civil rights movement that overemphasize the exceptionalism of the Jim Crow South.[12] Furthermore, the right to discriminate has never disappeared. Because of continued societal ambivalence about the most expansive visions of government-imposed antidiscrimination norms and because the right to discriminate taps into widely shared commitments to privacy and personal freedoms, it has continued to play a central role in policy debates. With the resurgence of populist libertarianism in recent years, we continue to hear powerful echoes of debates over the right to discriminate during the civil rights era.

Judging the Right to Discriminate

With regard to litigation, the story of the right to discriminate during the civil rights era can be summarized easily: judges never bought the argument. Those advocating a right to discriminate relied on various constitutional provisions, most commonly due process and the First Amendment, but also the Takings Clause and even the Thirteenth Amendment's prohibition of involuntary servitude. From the 1940s through the 1960s, when states and the federal government were breaking new ground in civil rights policy, courts, with only the rarest of exceptions, dismissed all these constitutional claims. They generally did so in summary fashion, often indicating that right-to-discriminate arguments were hardly worthy of recognition.

This rejection of a right to discriminate rested on a long and unbroken line of precedent. Even during the 1880s and 1890s, when the Supreme Court seemed more interested in using the Fourteenth Amendment to protect the liberty interests of business owners than the freedoms of African Americans, the Court never accepted the idea of a right to discriminate in privately owned facilities serving the general public, such as restaurants or hotels. In 1883, when the Supreme Court struck down the Civil Rights Act of 1875, which prohibited discrimination in "inns, public conveyances on land or water, theatres, and other places of public amusement," a majority of the justices found that Congress lacked power under the Fourteenth Amend-

ment to prohibit a "private wrong," not because it found that private wrongdoers had some sort of constitutional right to discriminate.[13] The Court recognized that states, through common law and statutes, could prohibit private discrimination, noting that the federal law it was striking down was actually largely redundant because most states already had common law protections against certain forms of discrimination in public accommodations.[14] In response to the Court's ruling, many states passed their own public accommodation laws. Even during the heyday of Jim Crow, none of these laws was successfully challenged in court on right-to-discriminate grounds.[15]

Courts refused to protect the right to discriminate for two reasons. One was that there was little demand for courts to do so. Jurisdictions where there were strong majoritarian demands for racial discrimination were unlikely to have antidiscrimination laws; if such laws existed, they were often flouted.[16] For a court to apply the right to discriminate required two elements: a jurisdiction with the political will and interest to pass an antidiscrimination law that went far enough to arguably infringe some personal liberty, and a court that had the will and interest to use the Constitution to void this law. These elements rarely coexisted. Thus, the right to discriminate functioned as a social practice even without recognition by the courts.

Second, as a matter of legal logic, to recognize an individual's constitutional right to discriminate also required a recognition of an individual's right *not* to discriminate. This was about freedom of choice after all. But judicial recognition of an individual freedom not to discriminate would undermine the entire legal rationale of the Jim Crow South, for segregation laws would necessarily fall in the face of such a legal right. For this reason, libertarian jurisprudence posed a powerful challenge to legalized segregation.[17] (For this reason as well, segregationists in the 1950s and 1960s displayed flagrant opportunism and hypocrisy when they pivoted from defending segregation laws to defending their liberty to choose to discriminate.) Justice John Marshall Harlan dissented in *Plessy v. Ferguson* (1896) partially on such grounds: "If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each."[18] Harlan again voiced a libertarian-inflected critique of segregation policy in *Berea College v. Kentucky* (1908). In fighting the state's demand that it be segregated, Berea College asserted that the right to contract protected its private choices about whom to admit. Harlan, in dissent, supported the college's claim of a right not to discriminate, denounc-

ing the segregation law as "an arbitrary invasion of the rights of liberty and property guaranteed by the 14th Amendment against hostile state action."[19]

When legally mandated segregation was the rule throughout the South, segregationists rarely talked about discrimination as a personal right. Jim Crow was driven by an agenda of conformity; the entire point of segregation laws was to take away choice.[20] Hence, the right to discriminate arrived on the scene only when legally enforced discrimination was replaced by legally enforced nondiscrimination.

The first time the Supreme Court squarely considered whether antidiscrimination law applied to private groups and individuals might impinge on constitutionally protected rights was in a 1945 case involving a New York state law that prohibited racial discrimination in unions. In *Railway Mail Association v. Corsi*, a union of postal clerks claimed that this law infringed their property and liberty of contract rights as well as their "social rights." The union sought to differentiate the right to discriminate from various due process–based economic rights (such as right to contract) that courts, after the demise of *Lochner*-style jurisprudence in the 1930s, no longer recognized. The right to discriminate in the choice of union members was a "social right," based in the "natural rights of the individual" and "conveying no legal injury to another in a state of society." Therefore, these choices were "not subject to regulation under the police powers of the State." "There will always be discriminations," the union's brief explained. "We discriminate in the method of our religious worship. We discriminate in the choice of our friends. We differ in our tastes and likes, and yet nothing can be done about this for it is beyond regulation in the absence of a binding grant from us to our form of government. . . . This is a personal and constitutional right beyond the power of legislation."[21] The Supreme Court summarily rejected this argument as having "no constitutional basis."[22] After *Corsi*, the basic premise that the Constitution does not protect an individual's right to discriminate was repeatedly reaffirmed in the courts, always in similarly summary fashion.[23]

Occasional judicial forays moved away from this line of clear precedent. Given the chance, plenty of southern judges undoubtedly would have denounced any antidiscrimination law that crossed their benches, recognizing a right to discriminate in the process. In the case arising out of the Montgomery Bus Boycott, for example, a federal judge in Alabama opined that private business operators "have the liberty to select their own associates and the persons with whom they will do business" and that "such liberty is

guaranteed by the due process clause of that Amendment."[24] Yet judges who would be moved to make these kinds of statements rarely received the opportunity to decide a case on these grounds. (The bus boycott opinion actually struck down the Montgomery segregation law—the due process discussion was obiter dicta.) Judges of this type were most likely to be seated in states that were least likely to be passing antidiscrimination laws.

One exception was Justice Joseph Mallery of the Washington Supreme Court. In 1959, Mallery wrote a dissent denouncing a recently passed state public accommodations law as infringing basic constitutional liberties. "This right of discrimination in private businesses is a constitutional one," pronounced Mallery. "Discrimination is but another word for free choice. . . . Both the clientele and the business operator have a constitutional right to discriminate in their private affairs upon any conceivable basis. The right to exclusiveness, like the right to privacy, is essential to freedom."[25] Mallery's words were regularly cited by opponents of civil rights reforms, including those who challenged the constitutionality of Title II of the 1964 Civil Rights Act.

The legal challenges to Title II gave federal courts another opportunity to consider whether the Constitution protected an individual's right to discriminate. Although Lester Maddox's case never went beyond the trial court, two other cases made it to the Supreme Court—one involving the owner of an Atlanta motel, the other involving the owner of a Birmingham restaurant. Both relied extensively on claims of a right to discriminate.

Ollie McClung, owner of the Birmingham restaurant, argued that Title II infringed on business owners' "rights to their property and in their liberty to use it as they choose—rights which are expressly included within the due process clause of the Fifth Amendment." The Due Process Clause protects "the freedom of a business enterprise to select its patrons and customers," regardless of the grounds for that decision. "It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice."[26]

In the *Heart of Atlanta Motel* case, Moreton Rolleston Jr., owner of the motel (who litigated his own case), proposed a more eclectic constitutional basis for his claimed right to discriminate. Not only did Title II's antidiscrimination requirement run afoul of the Due Process Clause, it also constituted an uncompensated taking of property in violation of the Fifth Amendment. Rolleston claimed to have located yet another constitutional footing for the right to discriminate in the Thirteenth Amendment's pro-

hibition on involuntary servitude.[27] "To deprive a person of this basic right to pursue his calling . . . unless he furnishes labor or services for certain individuals for whom he does not desire to work is obviously coercion if not outright punishment. When an individual is either coerced into working for another or punished for failure to do so, the inescapable conclusion is that such employment amounts to involuntary servitude."[28]

Relying on the Thirteenth Amendment as a shield against antidiscrimination law is a strange—indeed, perverse—idea. This amendment liberated America's slaves. Congress (with the support of the Court) has used it to prohibit private racial discrimination in contracting and the sale of property.[29] To argue that the same amendment could also be used to protect white businesses against antidiscrimination requirements was clearly an act of desperation.

Yet in the early 1960s, this unusual Thirteenth Amendment argument featured prominently in the debate over the appropriate line between antidiscrimination policy and personal liberties. Rolleston relied extensively on the scholarship of Alfred Avins. Avins, something of an itinerant lawyer and law professor during this period, was a conservative gadfly, a prolific legal scholar, and a compulsive collector of graduate degrees. (He received his law degree from Columbia University in 1956. In the decade following, he received a master's degree in law from New York University, a master's and doctorate in law from the University of Chicago, and a doctorate from Cambridge.) A native New Yorker, he was an unusual advocate for the idea that most modern civil rights policy violated the Constitution. Yet believe this he did, and he quickly gained the attention of southerners who were desperately searching for legal footholds from which to make their stand against the civil rights movement. Avins readily offered his services as an expert on constitutional law and history.[30]

Avins's basic argument was that the Constitution protected individuals against most government nondiscrimination requirements. In the spring of 1964, he published an article in *U.S. News and World Report*, "Maybe It's Time to Look at the Antislavery Amendment: Is It Unconstitutional to Require a White Employee to Serve Negro Customers in 'Places of Public Accommodation'?," an abridged version of an article he had previously published in the *Cornell Law Quarterly*. There had been "surprisingly little discussion," Avins lamented, about the Thirteenth Amendment in the context of public accommodation laws as applied to personal service occupations. "This provision bans absolutely, and in the most express terms, the claim of any person

to force any other person to serve him, for any reason whatsoever." As originally envisioned by its drafters, Avins argued, the Thirteenth Amendment promoted liberty, not equality. As applied to the issue at hand, he wrote, "A waitress can no more be required to wait on all persons who come into her shop without discrimination than can a cotton picker be required to pick cotton for all who want his services without discrimination."[31]

Avins's unlikely argument received considerable attention. Most notably, Arthur Krock, a conservative *New York Times* columnist and Kentucky native, championed Avins and his provocative argument. In the spring of 1964, as the Civil Rights Act was moving toward passage, Krock published several editorials urging consideration of the "great constitutional issue" posed by the pending legislation. The potential costs of the law on liberty—on "individual freedom of choice"—deserved more attention, Krock wrote. "The intolerance with which the bill is urged in the name of tolerance" was cause for concern.[32] He called attention to Avins's *Cornell Law Quarterly* article, which Krock described as a "profound study" and a "detached analysis of the constitutional issue." Avins deserved credit for having "project[ed] into the debate on the equal rights bill a great constitutional issue it poses; and one which has been carefully avoided or strangely neglected."[33]

For all the efforts Avins and the lawyers in *Heart of Atlanta* and *McClung* put into the Thirteenth Amendment and other liberty-based constitutional arguments against public accommodations laws, courts easily set them aside. "No one can seriously contend that requiring a motel proprietor to accommodate Negroes on the basis of equality with guests of other races so long as he chooses to stay in business is a requirement 'akin to African slavery,'" explained the Justice Department's brief in *Heart of Atlanta*. "To argue that [the amendment's] framers, by their very work, placed discrimination in public accommodations wholly beyond the reach of both federal and State law is nothing short of absurd."[34] In oral argument before the Court, Solicitor General Archibald Cox was similarly blunt: "Surely it would turn the world quite upside down for anyone to seriously suggest that the Thirteenth Amendment was intended to prohibit either Congress or the state governments from guaranteeing Negroes equality of treatment in places of public accommodation."[35] This conclusion was accepted by every court that heard a Title II challenge. The district court in Lester Maddox's case dispatched the Thirteenth Amendment claim in a sentence.[36] The Supreme Court in *Heart of Atlanta Motel* gave the argument marginally more attention—four sentences.[37] In his concurrence, Justice Hugo L. Black dis-

missed the argument with a footnote: "The motel's argument that Title II violates the Thirteenth Amendment is so insubstantial that it requires no further discussion."[38]

The Supreme Court was only marginally less dismissive in its treatment of the various other possible constitutional bases for the right-to-discriminate claim. It referenced and summarily rejected all claims that Title II infringed constitutional protections of property or liberty.[39] Justice Black did little to hide his irritation with these arguments, which he characterized as claiming "that the broad power of Congress to enact laws deemed necessary and proper to regulate and protect interstate commerce is practically nullified by the negative constitutional commands that no person shall be deprived of 'life, liberty, or property, without due process of law' and that private property shall not be 'taken' for public use without just compensation." There was, however, simply no basis to challenge Title II on either due process or takings grounds. His assessment of the takings argument could have been used for practically every judicial evaluation of the right to discriminate during the civil rights era: it "does not even come close."[40]

Debating the Right to Discriminate

Regardless of whether they had any chance of being recognized in court, claims of a right to discriminate could be heard whenever government attempted to enforce a nondiscrimination norm on reluctant citizens. As civil rights activists found courts and legislatures increasingly receptive to their demands for government-enforced protection against discrimination in all walks of life, opponents mobilized an array of arguments. They praised the values and traditions of white supremacy. When it was the federal government demanding nondiscrimination, they sang the song of states' rights. And with increasing prominence over the course of the civil rights movement, they turned to the argument that antidiscrimination policy threatened their individual liberties. This argument was never regarded as a serious one in the courts, but it was a formidable one in extrajudicial contexts.

Schools

In the first major constitutional showdown of the civil rights era, white southerners defended racially segregated schools on three basic constitu-

tional grounds. They argued that the Equal Protection Clause should not be used to uproot established social customs that had the support of (white) democratic majorities. They argued that educational policy was not a federal issue and that decisions on these matters should be left to the states. And they argued that parents have a right to control the environment in which their children learn and the people with whom their children associate. The last of these defenses of segregated schools, a variant of the right to discriminate, was never as prominently pressed as the others, and it has received far less scholarly attention. Yet this argument had a significant place in the debate over *Brown v. Board of Education*. These efforts to reframe the defense of segregation as a matter of individual liberty were an early articulation of an argument that would be at the center of the civil rights battles that followed.

As a matter of logic and legal doctrine, a libertarian-styled challenge to school desegregation had obvious flaws. A private school might have some claim to privacy or associational rights that a government nondiscrimination requirement infringed, but this argument made less sense when applied to public schools.[41] After all, the entire principle of a right to discriminate was premised on a belief that public and private discrimination were different and that even if the Constitution required government to be nondiscriminatory in its dealings, private individuals should not be held to the same standard. Nonetheless, segregationists defended school segregation not only by referencing a commitment to states' rights and claims of black inferiority but also through a more individualistic, libertarian critique of excessive government interference with personal choices.

The argument that the racial composition of a public school affected choices that were private and personal enough to justify protection from the Fourteenth Amendment's antidiscrimination requirement drew on assumptions about the role of schools in society from an earlier era. At the time of the ratification of the Fourteenth Amendment in 1868, observers broadly accepted that the amendment prohibited discrimination in access to basic "civil rights" (for example, the right to contract, to buy and sell property, and to access the courts) but that it did not apply to "social rights."[42] The schooling of children, according to this reasoning, fit alongside personal associational choices in the category of social rights. This was a central theme of *Plessy v. Ferguson*, where the Court stated that the Fourteenth Amendment "could not have been intended . . . to enforce social, as distinguished

from political equality, or a commingling of the two races upon terms unsatisfactory to either." The *Plessy* Court grouped schools alongside privately operated public accommodations, such as theaters and railroad cars, as operating within a social sphere in which racially prejudicial choices were constitutionally permissible.[43] Even Harlan, who famously dissented in *Plessy* because he saw railroad segregation as infringing a basic civil right, seemed to agree that schools belonged to a sphere of activity in which the Constitution permitted racial segregation.[44]

Whatever its merits in the nineteenth century, the idea that schooling involved social rather than political or civil equality came to be increasingly difficult to defend in the twentieth century, as Chief Justice Earl Warren emphasized in *Brown v. Board of Education* (1954), recognizing education as "perhaps the most important function of state and local governments" and "the very foundation of good citizenship."[45] Nonetheless, the idea that schools should be treated differently from other state functions remained prominent among critics of *Brown*. As a district court judge who upheld a South Carolina school segregation policy explained, "In formulating educational policy at the common school level . . . the law must take account . . . of the wishes of the parent as to the upbringing of the child and his associates in the formative period of childhood and adolescence. . . . The equal protection of the laws does not mean that the child must be treated as the property of the state and the wishes of his family as to his upbringing be disregarded."[46] This point featured prominently in the Declaration of Constitutional Principles, commonly known as the Southern Manifesto, a denunciation of *Brown* signed by nearly all southern members of Congress in 1956. It stated that the principle of separate but equal as applied to education was "founded on elemental humanity and commonsense, for parents should not be deprived by Government of the right to direct the lives and education of their own children."[47] In Virginia, opponents to school desegregation chose to name their organization the Defenders of State Sovereignty and Individual Liberties.[48]

A belief in parents' right to control the educational environment of their children, even when doing so entailed racial segregation, was echoed in some unusual quarters. One fervent supporter was political theorist Hannah Arendt, who offered a sophisticated argument for allowing discriminatory choices free rein in the "social" realm, where group distinctions served a valuable role. While equality should be vigilantly protected in the political sphere and law had no place regulating choices in the private sphere (Ar-

endt opposed antimiscegenation laws), there was a middle ground of life, "society," in which the legitimacy of discriminatory choice should be recognized. Discrimination, she explained, was the "innermost principle" of the social sphere. "Without discrimination of some sort, society would simply cease to exist and very important possibilities of free association and group formation would disappear."[49] Strikingly, her basic conclusion echoed the Southern Manifesto: "To force parents to send their children to an integrated school against their will means to deprive them of rights which clearly belong to them in all free societies—the private right over their children and the social right to free association."[50]

Another version of this argument was offered by law professor Herbert Wechsler in his widely noted 1959 Holmes Lecture at Harvard Law School. *Brown*, he insisted, implicated questions of associational rights, rights that could be claimed on both sides of the issue. "If the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant." The issue, in Wechsler's reframing, was one of competing constitutional claims. He then linked this constitutional dilemma back to the central theme of his lecture, the need to identify "neutral" principles to guide constitutional doctrine. "Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?" Wechsler concluded that he did not know of a neutral principle that would resolve this question.[51]

Few people today would think that a constitutional defense of public school segregation on the grounds of liberty of association makes much sense. As Charles L. Black Jr. explained in his famous critique of Wechsler, equality may indeed require "a corresponding loss of freedom on the part of the whites who now must associate with Negroes on public occasions." But associational freedom "in fact, exists only at home; in public, we have to associate with anybody who has a right to be there. The question of our right not to associate with him is concluded when we decide whether he has a right to be there."[52]

That variations of the right to discriminate could be heard among critics of school desegregation, even from figures such as Arendt and Wechsler, hardly allies of the segregationist cause, indicates the rhetorical power it was capable of expressing. When applied elsewhere, as in challenging an-

tidiscrimination laws in public accommodations, the right to discriminate would prove far more influential.

Public Accommodations

The fullest hearing for the claim of a right to discriminate came during the debate over the public accommodations provision of the Civil Rights Act of 1964. Here, the libertarian case against civil rights made its most dedicated stand. For defenders of the right to discriminate, the passage of this landmark civil rights law was, in the words of Alabama governor George Wallace, "a sad day for individual freedom and liberty."[53]

THE SIT-INS AND THE STATE ACTION DOCTRINE

The right-to-discriminate claim had a dry run of sorts in the debate over whether, in the absence of a public accommodations law, proprietors of privately owned public accommodations violated the Fourteenth Amendment when they discriminated based on race. This was the central legal issue raised by the lunch counter sit-in movement that swept across the South in 1960.[54] Whereas courts easily dismissed right-to-discriminate claims when framed as challenges to antidiscrimination laws, the sit-ins proved a genuinely difficult judicial issue. As a matter of constitutional analysis, the issue did not squarely raise the question of an individual's right to discriminate but rather involved a question of the scope of the Equal Protection Clause's application—specifically, whether discrimination in public accommodations met the Fourteenth Amendment's "state action" requirement. Nonetheless, this question raised fundamental issues that were also at stake in the debate over the right to discriminate: the value of free choice; privacy, property, and associational rights; and skepticism toward government regulation.

The state action doctrine was regularly defended as necessary to protect the "right" of private individuals to make choices unfettered by constitutional restrictions. The language of rights was notable here because, as a matter of judicial doctrine, this "right" had been thoroughly rejected when placed in opposition to a statutory antidiscrimination requirement. Loose usage of rights language is commonplace outside the courts. So it was hardly surprising when, following sit-in protests in Chapel Hill, North Carolina, the local newspaper complained, "Trampling on another's rights, even when hungering for your own, isn't the way to do it," or when restaurant owners

in Atlanta ran a statement defending "the basic right of an individual, any individual of whatever race, creed, or color, to engage in business, to purvey any commodity or service which is lawful, to cater to a clientele of its own choosing.[55]

Yet judges also argued that rights were at stake when the courts decided how far to extend the Fourteenth Amendment. For example, in 1958, the North Carolina Supreme Court discussed the "right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires."[56] Three years later, in a similar case, the same court even specified the right as based in the Constitution: "White people also have constitutional rights as well as Negroes, which must be protected, if our constitutional form of government is not to vanish from the face of the earth."[57] Justice Black, who had strong reservations about applying the Fourteenth Amendment to public accommodations, privately articulated his concern in terms of protecting associational and property rights.[58] Similarly, Justice John Marshall Harlan II, criticizing what he saw as the Court's undermining of the state action limitation, identified the right to discriminate as a necessary counterweight to a government interest in promoting racial equality: "Freedom of the individual to chose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference."[59] Thus we can see, both inside and outside the courts, the force of conceptualizing this constellation of privacy, property, and associational interests as a constitutionally grounded right—even when the judiciary had been unwilling to take seriously claims based on this supposed right.

TITLE II OF THE CIVIL RIGHTS ACT OF 1964

The debate over Title II of the 1964 Civil Rights Act largely recapitulated the contest over the limits of state action and the role of a right to discriminate in defining these limits. All sides accepted that a civil rights law that interfered with personal associational choices would be constitutionally suspect. The critical issue was what kinds of activities were personal enough to merit protection from antidiscrimination law. A concern that Title II reached too far, as a matter of either policy or constitutional interpretation (or, in most cases, some not fully articulated mixture of the two), was a major element in the congressional debate. Much of this debate focused on whether Congress could prohibit private discrimination—specifically whether congressional

authority was more or less extensive if based in the Commerce Clause alone or in a combination of the commerce power and the enforcement provision of the Fourteenth Amendment.[60]

Once proponents of the bill committed themselves to the Commerce Clause as the primary basis for Title II, the major remaining point of constitutional dispute was federalism: whether federal regulation of private businesses for this purpose lay beyond the authority of Congress. But lurking in the background and occasionally emerging as a critical constitutional issue was the question of whether certain applications of public accommodations law infringed on individual liberties. Opponents typically attacked the bill as both going beyond congressional power and infringing on individual liberty. While courts treated these claims as quite different, in the constitutional debate that took place on the floor of Congress and around the nation over the Civil Rights Act, the two were often impossible to separate. (One suspects that when Senator Richard Russell attacked Title II as "the most unconstitutional 66 words conceived by man," he was not questioning merely Commerce Clause doctrine.)[61] Representative George Meader saw ominous signs of a "government by injunction." Congress must do more to "safeguard and promote individual liberty and insure the right of every citizen to fullest participation in his Government."[62] In a dissenting report accompanying an early House version of the bill, opponents derided it for ignoring basic protections of the Bill of Rights: "One freedom is destroyed by governmental action to enforce another freedom."[63] "The free and uncontrolled use of private property is essential to freedom," announced one southern senator.[64] Title II "would deny American citizens the freedom of choice—the freedom to select their own personal associates and business customers," declared another.[65]

In the closing days of debate, when Senator Barry Goldwater announced his intention to vote against the bill, he justified his position largely on his constitutional reservations regarding Title II. Goldwater put considerable thought into the constitutionality of a federal public accommodations law. A year earlier, he consulted William Rehnquist, then a lawyer based in Phoenix, who advised Goldwater that he believed the law to be unconstitutional.[66] Goldwater then turned to Yale Law Professor Robert Bork. Bork, who had recently published an article in the *New Republic* that denounced public accommodations legislation as violating personal liberties, wrote a seventy-five-page brief for Goldwater outlining the constitutional infirmities of the civil rights bill.[67]

Bork's *New Republic* article, in which he attacked advocates of national public accommodations legislation for failing to count the costs of such a policy on individual freedom, has become probably the most famous defense of the right to discriminate. Bork separated himself from segregationist opponents of civil rights policy. He described the proposed legislation as based in "justifiable abhorrence of racial discrimination," and he lamented that most critics of the law were "southern politicians who only a short while ago were defending laws that enforced racial segregation" and hence only opportunistic libertarians. Yet, Bork insisted, one might oppose racial discrimination and still see something amiss in a national public accommodations law. "It is not whether racial prejudice or preference is a good thing but whether individual men ought to be free to deal and associate with whom they please for whatever reasons appeal to them. . . . The trouble with freedom is that it will be used in ways we abhor." State-enforced segregation was wrong, but so was state-enforced integration in certain spheres of private relations. The principle behind the proposed law, Bork explained, "is that if I find your behavior ugly by my standards, moral or aesthetic, and if you prove stubborn about adopting my view of the situation, I am justified in having the state coerce you into more righteous paths. This is itself a principle of unsurpassed ugliness."[68]

Goldwater was likely drawing on Bork's analysis when he justified his own opposition to the proposed federal public accommodations law. "There is a limit on how far we can go without upsetting the constitutional rights to freedom of association," Goldwater explained. "I believe deeply in integration. But I believe that it must be brought about in accordance with our Constitution and the fundamental concepts of freedom."[69] In a dramatic Senate speech delivered as the Civil Rights Act was about to pass, Goldwater, then the front-runner for the 1964 Republican presidential nomination, explained his continued opposition to a bill that had become, by the spring of 1964, quite popular nationally. He declared himself "unalterably opposed to discrimination or segregation on the basis of race," yet he felt compelled to oppose the public accommodations and fair employment provisions on constitutional grounds. His primary constitutional argument was that the civil rights law went beyond Congress's constitutional authority and infringed the rights of the states. But he also emphasized that the law threatened to "destroy the freedom of all American citizens." Its enforcement would necessitate measures that threatened the creation of a "police state" and the "destruction of a free society." He opposed "any threats to our great system

of government and the loss of our God-given liberties. . . . This is the time to attend to the liberties of all."[70]

Bork's libertarian critique found a receptive audience in another U.S. senator, North Carolina's Sam J. Ervin Jr. Like Goldwater, Ervin argued that members of Congress should take seriously their oaths to obey the Constitution by refusing to vote for legislation that they believed to be unconstitutional, regardless of what the Supreme Court said on the issue.[71] As to Title II, Ervin wrote that "few more blatantly unconstitutional and unwise pieces of legislation have ever been proposed." His constitutional concerns centered predominantly on congressional power and the need to preserve state control over matters of local concern. But he also insisted that individual liberties were at stake, quoting extensively from Bork's *New Republic* article and concluding, "Truly, in the midst of the cynical debate on how best can sections of the Constitution be stretched beyond their traditional understanding to encompass the aims of certain social theorists, there is all too little discussion of the immense price in personal liberty and freedom that will be the cost of such so-called reform."[72]

Perhaps no major public figure more enthusiastically denounced the Civil Rights Act as a violation of the right to discriminate—the "*precious* right to discriminate," as he put it—than James J. Kilpatrick, the editor of the *Richmond News Leader* and an outspoken defender of segregation.[73] To take away "the citizen's right to discriminate," he warned, would undermine "the whole basis of individual liberty."[74] Kilpatrick expounded on his views in *Civil Rights and Legal Wrongs*, a document he authored for the Virginia Commission on Constitutional Government in August 1963. Here, he offered a direct and uncompromising articulation of the constitutional case for the right to discriminate: "We do not propose to defend racial discrimination. We do defend, with all the power at our command, the citizen's right to discriminate. However shocking the proposition may sound at first impression, we submit that under one name or another, this is what the Constitution, in part at least, is all about. This right is vital to the American system. If this be destroyed, the whole basis of individual liberty is destroyed."[75]

Despite the fervor with which it was put forth, the idea of a right to discriminate, at least in the context of public accommodations, was roundly rejected. The courts certainly never thought much of this argument. An overwhelming majority of members of Congress put aside the constitutional reservations aired by Goldwater, Ervin, and others and voted for the Civil Rights Act. For the law's backers, strong public support for the law and gen-

erations of judicial precedent and societal practice conclusively refuted the idea that discrimination in public accommodations merited constitutional protection. How, asked Representative William McCulloch, could one say that Congress was "invading privacy, overturning the sanctity of private property, destroying personal liberties, or in other ways acting in an illegal manner," when in banning racial discrimination in public accommodations, it was just doing what many states had been doing for generations?[76] As a question of extrajudicial constitutional contestation, the case for the right to discriminate in public accommodations relied on an assumption that these services function in society in a way that was so personal and private that they require affirmative protection against government antidiscrimination regulations. By the 1960s, this argument simply failed on its merits.

This is not to say that the civil rights movement ended claims to a right to discriminate. A realignment took place in the scope of the right, but the essence of the claim remained. Even committed supporters of public accommodations legislation generally accepted that in certain realms of society, individual associational choices should be constitutionally shielded. As law professor Louis Henkin put it, "There is a small area of liberty which the Constitution favors above the claim to equality."[77] During his brief tenure on the Supreme Court, probably no justice more aggressively supported the cause of civil rights than Arthur Goldberg, yet even Goldberg defended the principle of the right to discriminate: "It is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties."[78] The real debate over the right to discriminate was not whether or not it existed but where to draw the line between those realms in which it would be recognized and those in which government antidiscrimination policy would prevail. That the realm of protected social relations did not include restaurants and hotels was, by 1964, an issue that had been pretty well settled.

The Right to Discriminate in Historical Perspective

The history of the right to discriminate in the courts and in the political debate over *Brown* and Title II highlights prominent defeats for proponents of this line of constitutional argument. As a judicial matter, the legal logic of the claim was sweeping, undermining public accommodations laws that

had been common practice for almost a century. Quite simply, no court—and certainly not the Supreme Court—was about to roll back the fruits of hard-fought legislative battles to protect what civil rights opponents believed to be their constitutional right to discriminate. If there were ever a chance the right to discriminate might play a role in limiting civil rights law, it would take place outside the courts. Yet even here, claims of a right to discriminate, while prominently aired, were of limited viability. By the 1950s and 1960s, the civil rights cause was too strong to be blocked by segregationists and libertarians who insisted that property, privacy, and association receive precedence over racial equality. Certainly in the context of public education or restaurants, these claims paled in comparison to the moral imperative that drove the legal accomplishments of the civil rights era. When constitutional claims are fought out in the political arena, democratic majorities ultimately decide their legitimacy.

Yet there is another side to the story of the right to discriminate. This right, rejected in the courts and regularly failing to persuade the majorities necessary for success outside the courts, nonetheless played a central role in the civil rights movement. Alongside its prominent defeats, the right to discriminate also had some consequential victories.

Its most significant victory came in response to open housing laws designed to uproot racial discrimination in the private housing market. Outside the South, housing discrimination was easily the most controversial issue of the civil rights era. As southern segregationists never tired of pointing out, housing was where the civil rights movement was truly brought home to whites in the North. It was the "northern civil rights frontier."[79]

Wherever open housing policy was considered, it faced considerable obstacles. Whites who might have fully supported nondiscrimination policy as applied to restaurants were not always as supportive when similar policy applied to the sale of their homes (or, perhaps more important, their neighbors' homes). These laws were always the product of contentious debate in which the right to discriminate was defended at great length, often with the well-funded backing of the real estate industry. Whites intent on protecting the racial demographics of their communities allied with real estate groups to create a powerful opposition to "forced housing" laws that undermined property and associational rights.[80]

California's open housing battle offers an example of the right to discriminate in action.[81] In the late 1950s and early 1960s, Californians passed some of the most ambitious protections against discrimination in the housing

market. Opponents, led by the California Real Estate Association (CREA), attacked these laws as violating the rights of property owners. "The essence of freedom is the right to discriminate," declared the CREA president.[82] In 1964, the CREA led the fight to pass Proposition 14, an amendment to the state constitution that would prohibit government interference with "the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."[83] Open housing advocates denounced the "Hate Amendment" and warned that it would send California down the path toward becoming "another Mississippi."[84] The CREA and other supporters of the law were attempting to claim that "bigotry is a national purpose or right"; they were seeking "to write the right to discriminate into the California Constitution."[85] Yet to the public relations director of the Proposition 14 campaign, the issue was clear: "The people have the right to discriminate if they want to."[86] "One of man's most ancient rights in a free society is the privilege of using and disposing of his property in whatever manner he deems appropriate," wrote the editors of the *Los Angeles Times*.[87] The amendment passed in a statewide referendum by a two-to-one margin. California was hardly aberrational. Around the time of its referendum, voters in five cities (including Berkeley, California, of all places) either rejected new open housing initiatives or repealed existing ones.[88]

California's codification of the right to discriminate was short lived. In 1966, the California Supreme Court struck it down, and the U.S. Supreme Court affirmed this ruling the following year.[89] In the U.S. Supreme Court's decision, Justice Byron White denounced the idea of creating a constitutional principle out of the "right to discriminate."[90]

Even if struck down in the highest courts of California and the nation, the right to discriminate remained vital and effective as a tool of political mobilization. Ronald Reagan, campaigning for the governorship of California in 1966, attacked the state supreme court's ruling. People have a "basic and cherished right to do as they please with their property," he stated. "If an individual wants to discriminate against Negroes or others in selling or renting his house he has a right to do so."[91]

As the debate over open housing in California illustrates, the right to discriminate was hardly confined to segregationist dead-enders in the South. When employed in opposition to the desegregation of schools or public accommodations, the argument failed to gain much adherence outside the

Deep South. Its logic was too tangled, its implications too sweeping, its assumptions about the line between personal associations and public life too implausible in modern American life. Yet when housing discrimination became a leading issue on the civil rights agenda, this rights claim, so improbable in its other applications, quickly became the argument of choice for open housing opponents throughout the nation.

Segregationists embraced the language of individual liberties because it provided a more politically acceptable way in which to resist civil rights, shifting the discussion of civil rights from a question of white supremacy versus equality toward a question of liberty versus equality.[92] Kilpatrick was quite explicit on this point. One of his goals, he explained, was to raise the white southern cause "above the sometimes sordid level of race and segregation."[93] The constitutional challenge to civil rights laws had "nothing to do with race or color," argued a columnist for the *Birmingham News*, "but may have all too much to do with civil rights and individual freedoms in the years to come."[94] In this regard, a professed commitment to "liberty" and "choice" served much the same role as a celebration of states' rights. Both offered a defense of segregation that was less explicitly racialized and therefore potentially more palatable to southern moderates and to a national audience.

To recognize that this turn to the language of freedom and rights was often flagrantly opportunistic and disingenuous does not take away from its effectiveness. For all the conspicuous failures of the libertarian challenge to civil rights, it provided another way in which opponents of civil rights could effectively operate in a post–civil rights movement society. It provided a language through which conservatives could accept much of what the civil rights movement had accomplished but also insist that antidiscrimination policy should have limits. And these limits could be defended using the same tools that conservatives had been cultivating in other contexts: a commitment to limited government and a suspicion that excessive government regulation would lead the nation down a slippery slope to socialism, and a belief that the expansion of government power necessarily diminishes personal liberties.[95] The argument that basic constitutional rights were at stake, that liberty must be championed alongside (or above) equality, opened the possibilities of creating alliances between defenders of segregation in the South and conservatives outside the South. Although proponents of the right to discriminate failed in their effort to discredit *Brown* and block the Civil Rights Act, their libertarian critique provided a potent

common ground that helped unite the segregationist cause with conservatives around the country.

* * *

During his successful 2010 campaign for one of Kentucky's seats in the U.S. Senate, Rand Paul raised a brief flurry of controversy when he questioned the constitutionality of Title II of the Civil Rights Act of 1964. The self-proclaimed "constitutional conservative" seemed to be making a point primarily about the reach of congressional power—an issue of particular relevance in the 2010 elections, as Paul and many other Tea Party–backed candidates denounced the recently passed federal health care law. Yet, echoing the segregationists' tangled claims about congressional power and individual rights, Paul also insisted that he was making a point about the "property rights" of business owners. "Decisions concerning private property and associations should in a free society be unhindered," he had written several years earlier in a letter to his local newspaper. "A free society will abide unofficial, private discrimination—even when that means allowing hate-filled groups to exclude people based on the color of their skin."[96] Paul's effort to revive a critique of public accommodations law that most Americans believed consigned to the dustbin of history fell conspicuously flat. Political friends and foes alike condemned Paul's comments, and the candidate quickly sought to change the subject.[97]

Paul's comments and the firestorm they sparked highlight two very different legacies of the right to discriminate in the decades since the civil rights movement. One is that a belief in this particular right is very much alive and well on the American scene. The libertarian sentiment on which the claim of a right to discriminate was based has only grown in strength with the conservative resurgence of the 1970s and beyond. Skepticism toward government regulation, framed as an issue of individual liberty, has been in ascendance, with the populist libertarianism of the Tea Party only its most recent manifestation.[98]

Paul's comments also highlight a different legacy of the right to discriminate: the civil rights movement fundamentally transformed the scope of this right, making a critique such as Paul's, commonplace in the 1960s, no longer acceptable in mainstream political discourse. One of the achievements of the civil rights movement was to contract the sphere in which American society allowed private discriminatory choice to dictate. At the height of Jim

Crow, the world of "social" relations in which racial discrimination was acceptable included wide swaths of American society—restaurants and hotels, public transportation, even schools. By the end of the civil rights movement, the right to discriminate had largely been confined to a narrow sphere of personal relations—family and home, church, private clubs. The Constitution "places no value on discrimination," wrote Chief Justice Warren Burger in a 1973 opinion involving all-white private schools. "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections."[99] The chief justice's statement was an accurate observation not only of a clear line of judicial precedent but also by the 1970s of a shift in popular expectations. This shift, in turn, transformed the nature of the constitutional claims that could be viably put forth when the nation debated the scope of antidiscrimination laws.

The debate over the right to discriminate has been replayed every time antidiscrimination laws place new restrictions on private actors. Campaigns against other forms of discrimination stirred new efforts to defend private discriminatory choice, including constitutional litigation and extrajudicial claims-making.[100] In 2000, New Jersey's effort to prohibit sexual orientation discrimination resulted in a Supreme Court decision in which, for the first time, the justices struck down a nondiscrimination requirement as applied to a private organization on the grounds that the requirement infringed the group's constitutional rights.[101] So even as gay rights activists succeed in restricting the sphere of legally and socially acceptable discrimination, a commitment to the right to discriminate persists. The resolution of this civil rights battle, like all others, will come from the messy dynamic of constitutional contestation, inside and outside the courts, in which any effort to expand government protection of the right to nondiscriminatory treatment will have to come to terms with the right to discriminate.

NOTES

The epigraph is from Robert T. Simpson, "The Public Accommodations Section of the Civil Rights Bill," *Alabama Lawyer* 25, no. 3 (1964): 308.

1. For an insightful profile and analysis of Maddox, see Jason Sokol, *There Goes My Everything: White Southerners in the Age of Civil Rights, 1945–1975* (New York: Knopf, 2006), 182–87, 231–35.

2. Ibid.

3. "Restaurateur Defiant," *New York Times*, August 11, 1964.

4. Sokol, *There Goes My Everything*, 185; "Lester Maddox Yields to U.S. Court," *New York Times*, February 7, 1965.

5. Sokol, *There Goes My Everything*, 185.

6. Richard Cortner, *Civil Rights and Public Accommodations: The Heart of Atlanta Motel and McClung Cases* (Lawrence: University Press of Kansas, 2001), 53; *Willis v. Pickrick Restaurant*, 231 F. Supp. 396 (D.C. Ga. 1964) (per curiam).

7. Richard Severo, "Lester Maddox, Whites-Only Restaurateur and Georgia Governor, Dies at 87," *New York Times*, June 26, 2003.

8. *Willis v. Pickrick Restaurant*, 401.

9. See, e.g., Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long Civil Rights Movement* (New York: Oxford University Press, 2011).

10. Kevin M. Kruse, "The Fight for 'Freedom of Association': Segregationist Rights and Resistance in Atlanta," in *Massive Resistance: Southern Opposition to the Second Reconstruction*, ed. Clive Webb (New York: Oxford University Press, 2005), 100.

11. On the use of the concept of freedom by racial conservatives, see Sokol, *There Goes My Everything*; Eric Foner, *The Story of American Freedom* (New York: Norton, 1998), 307–15.

12. A steadily growing literature focuses on the civil rights movement as a national rather than distinctly southern event. See, e.g., Jeanne F. Theoharis and Komozi Woodard, eds., *Freedom North: Black Freedom Struggles outside the South, 1940–1980* (New York: Palgrave Macmillan, 2003); Nancy MacLean, *Freedom Is Not Enough: The Opening of the American Work Place* (New York: Sage; Cambridge: Harvard University Press, 2006); Thomas J. Sugrue, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North* (New York: Random House, 2008); Matthew D. Lassiter and Joseph Crespino, eds., *The Myth of Southern Exceptionalism* (New York: Oxford University Press, 2010).

13. *Civil Rights Cases*, 109 U.S. 3, 17 (1883).

14. Ibid., 25.

15. See, e.g., *Western Turf Association v. Greenberg*, 204 U.S. 359 (1907); *Pickett v. Kuchan*, 323 Ill. 138, 153 N.E. 667 (1926); *People v. King*, 110 N.Y. 418, 18 N.E. 245 (1888).

16. Jack Greenberg, *Race Relations and American Law* (New York: Columbia University Press, 1959), 101–12; Davison M. Douglas, *Jim Crow Moves North: The Battle over Northern School Segregation, 1865–1954* (New York: Cambridge University Press, 2005), 134–35.

17. See David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago: University of Chicago Press, 2011), 73–89.

18. *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting).

19. *Berea College v. Kentucky*, 211 U.S. 45, 68 (1908) (Harlan, J., dissenting).

20. See, e.g., Numan V. Bartley, *The Rise of Massive Resistance: Race and Politics in the South during the 1950s* (Baton Rouge: Louisiana State University Press, 1969).

21. Brief for Appellant, *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945) (No. 691), February 13, 1945, 28, 29–30, 32–33.

22. Ibid., 94.

23. See, e.g., *Bob-Lo Excursion Co. v. People of State of Michigan*, 333 U.S. 28, 33–34 (1948); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953); *Jones v. Haridor Realty Corp.*, 37 N.J. 384, 394–95 (1962).

24. *Browder v. Gayle*, 142 F. Supp. 707, 715 (D.C. Ala. 1956).

25. *Browning v. Slenderella Systems*, 54 Wash. 2d 440, 453–56 (1959) (Mallery, J., dissenting).

26. Brief for Appellees, *Katzenbach v. McClung*, 379 U.S. 294 (1964) (No. 543), October 2, 1964, 32.

27. Jurisdictional Statement and Brief, *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (No. 515), September 21, 1964, 8, 14, 51–58.

28. Ibid., 57.

29. Civil Rights Act of 1866, 14 Stat. 27; *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Runyon v. McCrary*, 247 U.S. 160 (1976).

30. Robert H. Williams, "Legal Scholar Alfred Avins Dies at Age 64; Founder of Law Schools in Northern Va. and Delaware and Author of 4 Books," *Washington Post*, June 11, 1999.

31. Alfred Avins, "Maybe It's Time to Look at the Antislavery Amendment: Is It Unconstitutional to Require a White Employee to Serve Negro Customers in 'Places of Public Accommodation'?" *U.S. News and World Report*, May 11, 1964, 82–84; Alfred Avins, "Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Antidiscrimination Legislation," *Cornell Law Quarterly* 49, no. 2 (1964): 228–56.

32. Arthur Krock, "Intolerance in Pursuit of Tolerance," *New York Times*, May 14, 1964.

33. Arthur Krock, "The Thirteenth Amendment and the Equal Rights Bill," *New York Times*, May 7, 1964.

34. Appellate Brief, *Heart of Atlanta Motel v. United States*, September 28, 1964, 61.

35. Oral Argument, August 5, 1964, *Heart of Atlanta Motel v. United States*, in *Landmark Briefs and Arguments of the Supreme Court of the United States*, ed. Philip B. Kurland and Gerhard Casper (Arlington, Va.: University Publications of America, 1975), 41–42.

36. *Willis v. Pickrick Restaurant*, 401.

37. *Heart of Atlanta Motel v. United States*, 261.

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focusing instead on the question of congressional power. Yet in both instances, outside the courts, the opponents' insistence that there are costs to personal liberty that deserve attention received far more consideration than they did inside the courts. The libertarian critique of Title II failed as a matter of constitutional politics. It is unclear whether the same will be said about the libertarian critique of the Affordable Care Act. Even in the wake of the 2012 Supreme Court ruling upholding the individual mandate, popular opinion toward the law and particularly the mandate remains divided. Whether the Affordable Care Act eventually achieves the iconic status of the Civil Rights Act remains to be seen. See generally Christopher W. Schmidt, "The Tea Party and the Constitution," *Hastings Constitutional Law Quarterly* 39, no. 1 (2011): 101–55.

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